

No. 11023

United States
Circuit Court of Appeals
for the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,
vs.

PATRICK LUMBER COMPANY, a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUN 12 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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and

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United States District Court for the District
of Oregon

Civil No. 2559

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

PATRICK LUMBER COMPANY, a corporation,
Defendant.

COMPLAINT

Comes Now the plaintiff above named and alleges:

I.

That plaintiff, as Administrator, Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. L. No. 421, 77 Cong., 2d Sess., 56 Stat. 23), enacted January 30, 1942, as amended, hereinafter called "the Act."

II.

That defendant herein is a corporation existing under and by virtue of the laws of the State of Oregon.

III.

That jurisdiction of this action is conferred upon this Court by Section 205(c) of the Act and by said Section 205(e) of the Act.

IV.

That at all times hereinafter mentioned, there has been in effect, pursuant to the Act, Revised Maximum Price Regulation 26, as amended (7 Fed. Reg. 7871), establishing the maximum price for each of various grades of Douglas Fir and other West Coast lumber.

V.

That from and including August 29, 1943, more than six months after the date of approval and enactment of the Act, to and including October 8, 1943, the defendant, a wholesale lumber dealer, located at Portland, Oregon, sold [1*] and delivered direct mill shipments of Douglas Fir lumber, subject to Revised Maximum Price Regulation 26, as amended, to John Schroeder Lumber Co. certain carloads of lumber hereinafter described. None of said purchases was made for use or consumption other than in the course of trade or business, and defendant demanded and received for each of said shipments a price or consideration in excess of the maximum price established therefor by Revised Maximum Price Regulation 26, as amended. That the overcharges made by defendant are as follows:

Date	Order and Invoice No.	Car No.	Customer	Overcharge
1943				
Sept. 3	8358	NP- 17,862	John Schroeder Lumber Co.	\$256.74
Sept. 10	8358	NP- 12,494	John Schroeder Lumber Co.	226.56
Oct. 7	8358	WAB-45,712	John Schroeder Lumber Co.	234.86
Total.....				\$718.16

*Page numbering appearing at foot of page of original certified Transcript of Record.

VI.

That three times the aggregate amount by which the price received by the defendant referred to in Paragraph V above, exceeded the maximum price provided therefor, equals Two Thousand One Hundred Fifty-four Dollars and Forty-eight Cents (\$2,154.48).

Wherefore, plaintiff demands judgment on behalf of the United States against the defendant in the sum of Two Thousand One Hundred Fifty-four Dollars and Forty-eight Cents (\$2,154.48) and costs incurred herein.

/s/ JEROME S. BISCHOFF

Chief Attorney, Lumber Enforcement Unit San Francisco Regional Office, O. P. A.

/s/ NORMAN T. J. McCAFFERY

Enforcement Attorney, Portland District Office, O.P.A.

Dated this 2nd day of Sept., 1944.

[Endorsed]: Filed Sept. 2, 1944. [2]

[Title of District Court and Cause.]

AMENDED ANSWER

Defendant for answer (amended by leave of the Court) to plaintiff's Complaint.

I.

Denies paragraph I of the Complaint.

II.

Admits paragraphs II, III and IV of the Complaint.

III.

In respect of paragraph V of the Complaint admits it is a wholesale lumber dealer located at Portland, Oregon, and avers that from and including September 3, 1943 to and including October 7, 1943 it sold and delivered the three (3) carloads of Douglas Fir lumber (as identified in the Complaint) to John Schroeder Lumber & Supply Co., and that none of the lumber so sold by it was for use or consumption other than in the course of trade or business, and that prior to such sale it carefully studied the provisions of Revised Maximum Price Regulation 26, as amended, and took other practicable precautions against the occurrence of any violation thereof, and then made such sale in good faith and without any intent to violate any provision thereof wilfully or otherwise, and specifically denies each and every other allegation contained in paragraph V of the Complaint.

IV.

Denies each and every allegation contained in paragraph VI of the Complaint. [3]

For a further affirmative defense defendant avers that the Court lacks jurisdiction.

- (1) Because it does not appear in the Complaint that the bringing of this action has been authorized by the named plaintiff;
- (2) Because the attorney appearing for the named plaintiff has acknowledged in open court that

this action was brought by him on his own discretion and without specific authority from the named plaintiff to bring this particular action, and the same was brought without the exercise of the discretion of the named plaintiff:

(3) Because the attorney purporting to represent the plaintiff is without authority to bring this action or to represent plaintiff in this action;

(4) Because the Complaint fails to allege any delegation to the attorney appearing for plaintiff of the discretion of the named plaintiff to determine whether this action shall be brought or prosecuted; and

(5) Because the named plaintiff is not authorized by law to delegate his discretionary powers to any other person.

Wherefore defendant demands that plaintiff take nothing by his Complaint and that defendant have judgment for its costs and disbursements.

WILLIAM C. McCULLOCH

of Attorneys for Defendant

TEAL, WINFREE, McCULLOCH,

SCHULER & KELLEY

of Counsel for Defendant

December 5, 1944.

[Endorsed]: Filed Dec. 5, 1944. [4]

In the District Court of the United States
for the District of Oregon

Civil No. 2559

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

PATRICK LUMBER COMPANY, a corporation,
Defendant.

MEMO OF DECISION

I think plaintiff has failed to sustain the burden of proof. I do not feel convinced by a preponderance of the evidence that the interpretation of the regulations advanced by Mr. Jayne, and espoused by Mr. Bischoff, is the correct interpretation, as opposed to the interpretation acted upon by Patrick, Brushoff, Edwards and the mill.¹

This failure to sustain the burden of proof on the major issue makes it unnecessary to decide other questions.

Dated December 11, 1944.

CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed Dec. 11, 1944. [5]

¹ The question involved is a technical trade and industry question. See the letter of Mr. Stone where he grounds his position, at least in part, on what he considers sound conservation practice. See the letter of Mr. Patrick where he expresses the feeling that the mill-man should be complimented for his resourcefulness in getting out boards, then at a premium.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on for trial on December 5, 1944 before the Honorable Claude McColloch, Judge of said Court, plaintiff appearing by Jerome S. Bischoff and Norman T. J. McCaffery, and defendant appearing by William C. McCulloch and Howard T. McCulloch, and the parties having offered evidence and having argued and submitted the cause, and the Court having considered the evidence and argument and having taken the cause under advisement, the Court now makes the following:

FINDINGS OF FACT

I.

Defendant is an Oregon corporation engaged in business at Portland, Oregon, as a wholesale lumber dealer. From and including September 3, 1943, to and including October 7, 1943, defendant sold and delivered to John Schroeder Lumber & Supply Co., 3 cars of Douglas Fir Green Dimension lumber. The three cars so sold by defendant are described in the complaint.

II.

Revised Maximum Price Regulation 26 of June 9, 1943 prescribed maximum prices on Douglas Fir Green Dimension lumber and was in effect when defendant made said sale.

III.

The prices charged by defendant for the lumber in said three (3) cars did not exceed the maximum prices prescribed in said Regulation.

Based upon the foregoing Findings of Fact, the Court makes the [6] following:

CONCLUSIONS OF LAW

I.

The defendant did not violate the Emergency Price Control Act of 1942 or any regulation, order or price schedule issued thereunder.

II.

Defendant is entitled to a judgment that this action be dismissed.

Done this 18th day of December, 1944.

/s/ CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed Dec. 18, 1944. [7]

In the District Court of the United States
for the District of Oregon

Civil No. 2559

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

PATRICK LUMBER COMPANY, a corporation,
Defendant.

JUDGMENT

This cause having heretofore come on regularly for trial, the Parties having appeared by their respective attorneys, and the Court having heard and considered evidence and argument and having duly made Findings of Fact and Conclusions of Law, and the defendant at this time moving for judgment pursuant thereto, and the Court being fully advised in the premises, it is

Adjudged and Ordered by the Court that this action be and the same is hereby dismissed.

CMC Costs to Neither Party.

Done this 18th day of December, 1944.

CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed Dec. 18, 1944. [8]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Patrick Lumber Company, a corporation, defendant above named, and to William C. McCulloch, its attorney.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from that certain judgment, dismissing said action, made and entered in the above entitled action on the 18th day of December, 1944.

Dated at Portland, Oregon this 24th day of February, 1945.

/s/ F. E. WAGNER

/s/ W. DUNLAP CANNON, Jr.

Attorneys for Appellant

Chester Bowles,

Administrator

[Endorsed]: Filed Feb. 24, 1945. [10]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the plaintiff above named and as appellant in the above entitled action submits the following as his Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit.

1. Complaint
2. Amended Answer
3. Memorandum of December 11, 1944
4. Findings of Fact and Conclusions of Law.
5. Judgment of Dismissal
6. Order denying Motion for Supplementary Findings of Fact and Conclusion of Law
7. Transcript of Pre-trial Conference, December 4, 1944
8. Transcript of Trial, December 5, 1944
9. Notice of Appeal
10. This Designation of Record
11. Order to Forward Exhibits

Dated at Portland, Oregon, this 22nd day of March, 1945.

12. Transcript proceedings March 19, 1945, in re Motion Supplementary Findings of Fact and Conclusions of Law

F. E. WAGNER

Of Attorneys for Appellant

[11]

State of Oregon,

County of Multnomah—ss.

Due service of the foregoing Designation of Record is hereby accepted by receiving a duly certified copy thereof.

Dated at Portland, Oregon this 22 day of March, 1945.

WILLIAM C. McCULLOCH

Of Attorneys for Defendant

[Endorsed]: Filed Mar. 23, 1945. [12]

[Title of District Court and Cause.]

ORDER TO FORWARD EXHIBITS

It appearing necessary that the original exhibit in the above described cause accompany the transcript of record upon appeal to the Circuit Court of Appeals for the Ninth Circuit.

It Is Ordered that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit all original exhibits introduced in evidence in this cause.

Dated at Portland, Oregon, this 23rd day of March, 1945.

CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed March 23, 1945. [13]

United States of America,
District of Oregon—ss.

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD**

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 14 inclusive, constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil No. 2559, in which Chester Bowles, Administrator, Office of Price Administration, is Plaintiff and Appellant, and Patrick Lum-

ber Company, a corporation, is Defendant and Appellee; that said transcript has been prepared by me in accordance with the said designation of contents of the record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that there is enclosed herewith duplicate transcripts of pre-trial conference, and trial proceedings taken in this cause, also exhibits 1 to 15 inclusive.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 27th day of March, 1945.

[Seal] LOWELL MUNDORFF,
Clerk

By F. L. BUCK

Chief Deputy. [14]

[Title of District Court and Cause.]

Portland, Oregon, Monday, December 4, 1944.
11:09 o'clock A. M.

Before: Honorable Claude McColloch,
Judge.

PRE-TRIAL CONFERENCE

The Court: Now Mr. McCulloch. What do you have, Mr. Tongue? [1*]

Mr. Thomas H. Tongue III: Your Honor, I am interested in the pre-trial that is now about to take place, with the permission of the Court.

The Court: All right.

Mr. Bishoff: If the Court please, this is a treble-damage action, brought by the Administrator against the Patrick Lumber Company for over-charges which were made in violation of Revised Maximum Price Regulation No. 26, covering Douglas Fir lumber. Mr. McCulloch and I have reached a stipulation I believe on substantially all of the facts, some of the issues of law, and we have been able to reduce the other issues of law to our respective contentions, and we have a form of pre-trial order almost ready for submission to your Honor. We haven't completed it, awaiting the outcome of this morning's conference, and will submit it at that time.

The number of transactions is very small. They involve the shipment of three cars of lumber which

*Page numbering appearing at foot of page of original certified Transcript.

were purchased by the Patrick Lumber Company from a mill located at Eugene.

The controversy concerning the three cars is identical, and the question is what would be the proper prices for the item sold. The item sold and invoiced by the Patrick Lumber Company was of the same description as that which was bought, so there is no element of any change of any kind. The item sold is described on the sales invoices as Douglas Fir, surfaced one side to $1\frac{1}{2}$ inches, hit and miss, surfaced 2 edges standard [2] green, and we have attached to the order copies of the invoices both from the mill to the Patrick Lumber Company and from the Patrick Lumber Company to the customer.

It is stipulated in the agreed statement of facts that there is no dollar and cents price in the Regulation for this item. The controversy comes, then, as to whether Section 12 of the Maximum Price Regulation 26 is applicable to this item.

The sawmill itself, after the delivery of the lumber and pursuant to our request, filed an application with the Office of Price Administration, Lumber Branch, Washington, D. C., pursuant to Section 12, to obtain a price on the lumber sold, and the figures in the complaint, it is conceded, represent the overcharge computed by using the price which was fixed in response to the special application. The Patrick Lumber Company, which is a wholesale concern, did not file a special application and one of the issues of law, therefore, is whether or not the price fixed for these sales carries

over from the mill to the wholesaler in reselling the lumber.

The Court: State the last sentence again.

Mr. Bischoff: One of the issues is whether or not the price fixed by the Lumber Branch in response to the special application made by the mill carries over to a subsequent sale by a wholesale firm of the identical lumber.

Our position is that this lumber constitutes what is known as a direct mill sale, and it is so stipulated; that is, [3] that it moved directly from the sawmill to the ultimate customer physically, without possession ever having entered the Patrick Company. This is, the Patrick Company acted as a normal wholesaler does and bought and resold without taking the physical possession. The lumber was delivered directly and routed directly from the sawmill to the ultimate customer.

Then a second issue raised by the defendant in this case is whether or not the price which was fixed after the lumber had been sold and delivered in response to the special application had the effect of being applicable as of the time of the delivery.

Perhaps, in order to point up this preliminary discussion, I might call your Honor's attention to the provisions of Section 12 so that you can follow this a little better.

Section 12 reads as follows:

"Grades, services, or extras not listed.

"(a) If a seller wishes to sell a grade which is not specifically priced in the price tables, or wishes to make an addition for special workings, specifica-

tions, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington, D. C., for a maximum price."

Then it roughly provides he must describe the item, the price he wants, and so on.

Then it further provides:

"As soon as the request has been filed, quotations and [4] deliveries may be made at the requested price, but the final payment may not be made until the price has been approved. Action on the request may be by letter or telegram."

Now in this case the lumber was sold and billed and the money received, and the application was not made until long subsequent to that. So that the issue of law is, whether or not the price which was fixed on the application made at the later date had the effect of fixing the price as of the time of the delivery.

The defendant also raises the question of delegation of authority to the Office of Price Administration for authority to file this lawsuit. This case was instituted by myself and by Mr. McCaffery. I am the Chief of the Lumber Enforcement Unit of the San Francisco Regional Office of OPA, and the question raised will be, I suppose, perhaps that of the Wheeler case, which was decided by your Honor, though I am not clear as to whether or not the Wheeler case was decided on the general ground of the validity of the order, or whether or not there was some element of rati-

fication, or whether or not the suit in that case was filed before the order was signed.

The pleadings do not contain a good faith answer and Mr. McCulloch intends to urge it and will wish to amend, and we have no objection.

The facts stipulated are outlined in our pre-trial order and roughly admit all of the formal allegations: admit the authenticity of copies of the invoices which are attached as exhibits. [5] They admit the existence of the application of the West Side Lumber Company to the Lumber Branch for a price; a copy of a letter from the Lumber Branch to the West Side Lumber Company refusing and fixing price; a subsequent letter of the Lumber Branch fixing a price for this character of lumber.

Admit the arithmetic of the case; that is, the amount of overcharge, if the Court should find that there is an overcharge.

Then the agreed statement of facts further stipulates that copies of two letters from the Patrick Lumber Company, one directed to me and one directed to the West Side Lumber Company, may be introduced in evidence.

Stipulates that copies of the American Lumber Standards and of the Grading Rules of the West Coast Bureau of Lumber Grades and Inspection may be admitted.

Then there is one further element of fact, and that is we have also set forth a summary of testimony which would be given by a Supervisory Inspector of the West Coast Lumber Association

if he were called as a witness, as to the actual character of the lumber that was shipped.

Now Mr. McCulloch has reserved objection to the materiality—the right to object to the introduction of that evidence, but I don't believe that there is any question as to what he would state if he were called. That is correct, isn't it?

Mr. William C. McCulloch: What is that? [6]

Mr. Bischoff: I just want to know whether you agreed with my statement of our position about this Ranstrom evidence; that is, that Ranstrom, if called here, would testify as we have outlined, but that you reserve your right to object to the admissibility of the evidence.

Mr. William C. McCulloch: I don't question that the suggested witness would testify as Mr. Bischoff has stated, but I haven't agreed that what he would testify if he were called as a witness would be material, or that it should be incorporated in the pre-trial order. I may say in that connection, your Honor, the final draft of this proposed pre-trial order was handed to me after I came in the courtroom this morning and we haven't had a chance to settle the final details of it.

Mr. Bischoff: One other fact that I have set forth in the pre-trial order and which was not discussed in detail with Mr. McCulloch is the statement of facts, simply "That Patrick Lumber Company during the months of May or June, 1943, had filed with the Lumber Branch of the Office of Price Administration a special price approval application for a special nonpriced item generally de-

scribed in the"—it should be the "application"—"as New York Board of Transportation Ties."

Now we have agreed as to certain conclusions of law which we have incorporated in this draft of order, which substantially admit the jurisdictional allegations; admit that the regulation does not contain a dollar and cents price item on [7] this lumber; admit that the lumber constitutes direct mill shipments.

Then we have a section to the draft setting forth the Administrator's contentions of law, and roughly those contentions are these:

That in a situation in which there is no price in the Regulation and the sale is made without having made an application for a price, that a price subsequently fixed in response to an application is effective and binds—and does fix the price on that sale as much as though it had been in existence at the time of the actual delivery.

The second proposition is that once a price is fixed for a specific shipment of lumber, or for a direct mill shipment of lumber, it is applicable to the wholesaler, or whoever else in the chain of title handles the lumber while it continues in its characteristic of being a direct mill sale.

The Court: With or without notice?

Mr. Bischoff: Yes, your Honor. The third proposition of law is that any person who sells such an item of lumber, whether a mill man or a wholesaler, is responsible for his own overcharges to the extent that they exist, and the fact that one or the other of them may have been sued by the

Office of Price Administration, or made rebates, or anything of the kind, does not excuse the second or other party.

The next proposition of law is that the fact—

The Court: You have another case concerning this transaction?

Mr. Bischoff: Yes. We have a case pending against the sawmill in this Court. It is the West Side Lumber Company of Eugene, Oregon.

The Court: Oh, Mr. Tongue's case?

Mr. Bischoff: The case in which Mr. Tongue is interested; and that case involves not only these transactions but a considerable number of other unrelated transactions.

The Court: That has not gone to judgment, has it?

Mr. Bischoff: No.

The Court: Well, you don't claim you can recover twice, do you?

Mr. Bischoff: Pardon?

The Court: You don't claim you can recover twice, do you?

Mr. Bischoff: Yes, we do, your Honor. That is just as though these were—

The Court: Do you understand my question? I didn't ask you whether you could sue twice; I ask whether you could sue and recover for the same claim twice?

Mr. Bischoff: You mean could we claim over-charges from the sawmill, and then sue the wholesaler and recover overcharges?

The Court: The same transaction?

Mr. Bischoff: The same transaction.

The Court: Recover twice?

Mr. Bischoff: Yes. [9]

The Court: That would be six times.

Mr. Bischoff: Yes. Yes, it would, your Honor. Now the next question of law related to the Chandler Act offense of good faith and practicable precautions, and the argument roughly is that in the event that a vendor of lumber who has a special item which is not priced does not make an application for a price, he is liable for three times the amount of the overcharges.

In this case we will argue from some of the exhibits that the defendant was aware that this was not a standard item and had discussed the price with his supplier prior to the manufacturing of the lumber, and knowing that it was a scant product, not priced, it was his duty to apply, in accordance with the statute, and that if he did not he simply took the burden and the responsibility of accepting whatever price was ultimately fixed.

The Court: Mr. Tongue, I wish you would come inside. I may want to ask you some questions. I wish you would come over there. I know you will need to write and you may write on that table.

Mr. Bischoff: That is the gist of the case.

The Court: I would like anybody's answer to this question. To what extent is there an interlocking in this case with this other case which has just been mentioned against the mill? Can anybody enlighten me?

Mr. Bischoff: Yes, there is to this extent: The

price application was filed by the sawmill. The letter of approval from the [10] Lumber Branch of the Office of Price Administration was directed to the sawmill fixing that price.

The Court: To what extent, if I try this case tomorrow and decide it tomorrow, will I be deciding questions that are involved in the case against the sawmill, which has not yet been tried? That is what I want to know—questions of law and fact, or either?

Mr. Bischoff: Oh. It is a little hard to answer. I will do it the best I can this way. The basic propositions on this class of transactions are much alike. However, there are certain defenses which may be available to the wholesaler, Mr. Patrick, or the Patrick Lumber Company, which might not be available to the sawmill, because of the question of knowledge.

The Court: No. We start with this, don't we: that the transactions in this case are all involved in the case against the mill?

Mr. Bischoff: That is right.

The Court: And some others?

Mr. Bischoff: That is correct.

The Court: But everything that is here is in the mill case?

Mr. Bischoff: Yes, that is correct.

The Court: Now go ahead.

Mr. Bischoff: But I wish to point out that the wholesaler, the Patrick Lumber Company, is not in the same position as the mill, because they didn't actually manufacture the lumber and [11] don't

have the same knowledge, or may not have the same knowledge—and here it is claimed that they do not—that the sawmill does as to the material content of the lumber in those cars, which would possibly differentiate the two cases.

The Court: Well, I know, even on my inadequate grasp of the case from what you have said—I get your thought but it will take more than this to give me the knowledge of the case that the lawyers have, but from the inadequate grasp I have, one of these questions of retroactivity is common to both cases.

Mr. Bischoff: That is correct.

The Court: And as you have gone along it seemed to me there were other questions of construction of the regulations that are common to both cases.

Mr. Bischoff: That is, all of the phase of the case which has to do with the determination of what the price is on these three cars is common to both parties. Then in addition there is the question of whether or not that price carries over from the sawmill to the wholesaler, which would be a question only in this case.

The Court: Well, some of the questions in this case, should it be ruled adversely to the Government, would be determinative of the case against the mill, too, wouldn't they?

Mr. Bischoff: Yes, that is true. That is, they could foreclose our position.

The Court: What, for instance? [12]

Mr. Bischoff: Well, I mean if your Honor rules that—

The Court: You just go ahead and develop that a little further for me.

Mr. Bischoff: If your Honor rules that the price is not retroactive, for instance, that would foreclose the transaction. If your Honor should rule that the price is retroactive but that it does not transfer over to the wholesaler, that would foreclose our case against this defendant but not against the mill. It can take different forms.

The Court: It seems too bad to me that the same Judge is not trying both cases. I am sure that is the way it would have been handled had it been called to our attention there were two cases here involving the same transactions, and I expect to discuss with Judge Fee when I see him at lunch as to what we can do about it. What is the status of the case against the mill? When will it be for trial?

Mr. Tongue: That case is now pending on pre-trial conference, your Honor. It may be, however, there will be some other preliminary matters we desire to discuss with the OPA attorneys.

Mr. Bischoff: I am told that is on call for the eleventh, your Honor.

The Court: The Clerk just told me it is for pre-trial on the eleventh. Would you like to be heard, Gentlemen?

Mr. William C. McCulloch: If the Court please, I don't want to repeat but to sketch very briefly

the agreed statement of [13] facts as it is developed up till now with Mr. Bischoff.

The defendant stipulates that the plaintiff, Chester Bowles, is Administrator of the Office of Price Administration, but goes no further than that, and doesn't concede that he brings this action pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 as amended.

The defendant admits that it is an Oregon corporation and in the business of buying and selling lumber at wholesale, Douglas Fir lumber.

It is stipulated, as Mr. Bischoff stated, that the lumber in the three cars in question, as identified by mill invoices to Patrick Lumber Company, and by invoices from Patrick Lumber Company to its customer, the John Schroeder Lumber & Supply Company, are as shown in six exhibits which will be attached to the pre-trial order.

It is stipulated also that on August 3, 1944, the Office of Price Administration, Lumber Branch, by and through Peter A. Stone, Chief Price Executive, Lumber Branch, Washington, D. C., issued a special price to the West Side Lumber Company covering the lumber described in the fir—in that application. A copy of the original application will be an exhibit attached to the pre-trial order, and that exhibit indicates on its face that the mill made this application in accordance with request of Mr. Jerome S. Bischoff, of Portland, Oregon, OPA office.

Then Exhibit No. 9 is a copy of a letter from

Peter [14] Stone to the West Side Lumber Company dated June 22, 1944, in which Mr. Stone, the Price Executive of the Lumber Branch, informed the applicant that no such price could be approved at this time, and refused the application.

The Exhibit No. 10 is a copy of Peter Stone's letter of August 3rd, 1944, to the mill, establishing a price, referring to his previous refusal to establish a price, in which he says:

"We replied to your letter pointing out that inasmuch as request for price approval had not been made prior to shipment that we felt that we could not establish prices at this time. We are now advised by Acting Chief Counsel that in view of your request for the establishment of prices that we are required to comply."

Then his letter sets out the prices which Mr. Bischoff contends apply retroactively to these transactions.

The Court: How far back?

Mr. McCulloch: That is just what I was going to state, your Honor. The first of the three cars was shipped September 3rd, 1943; the second September 16, 1943, and the third October 7th, 1943, whereas the price finally approved, after one declination, was dated August 3, 1944.

The Court: Did Patrick know that the mill was doing this?

Mr. McCulloch: I don't know, but Mr. Patrick is here. Will you answer his Honor's question?

Mr. Patrick: I don't recall on that. I do remember the mill [15] came and talked to me after they

got the letter but I didn't see the letter until Mr. Bischoff showed it to me about September—well, the latter part of August, August 31st or somewhere along in there.

The Court: Patrick paid the mill and Patrick's customer paid him?

Mr. Patrick: Yes.

Mr. McCulloch: That is correct.

The Court: And the thing had all been closed up long before the—

Mr. Patrick: The lumber was all paid for.

Mr. McCulloch: That is very true, your Honor, yes; months before this price was established the transaction had been entirely closed. This matter of the retroactivity of this price established August 3, 1944, is of the most vital importance in this case, because the action is to recover treble damages. Now it is easy enough for the plaintiff to establish the price that the defendant charged its customers for the lumber, but for the purpose of establishing whether there was an overcharge there must be some basis of an established price with which to compare the price that the defendant charged its customer. In other words, if *there no* evidence of a base price with which the price charged to the customer can be compared, the action must fail of course for lack of proof.

I want to ask Mr. Bischoff in this connection, in con- [16] nection with the establishment of this price of August 3, 1944, by the Price Executive at Washington, D. C., other than the three exhibits, that is the letter of the mill of June 8th, the reply

of Peter Stone to that letter of June 22nd, and Stone's final letter of August 3, 1944, whether there were any communications on that subject between you or your office and Peter Stone or his office.

Mr. Bischoff: Why, yes, there were.

Mr. McCulloch: I shall ask—I think it is very material and vital for that correspondence, the complete exchange of communications on this subject—I haven't seen them, your Honor, and I don't know what they are, but I think the plaintiff should be required to incorporate the entire correspondence on the subject in any pre-trial order, or to make it available for inspection by the defendant's attorneys.

The Court: Let me have a couple of dates first. Working back, I have here August 3, 1944. That is where the price was fixed?

Mr. McCulloch: That is right.

The Court: Now give me the last shipment.

Mr. McCulloch: The last shipment, your Honor, was October 7, 1943.

The Court: That is the date on what—somebody's invoice?

Mr. McCulloch: That was the date of the Patrick Lumber Company's invoice to the John Schroeder Lumber & Supply Company. [17]

The Court: Now when did this mill—I understand at Mr. Bischoff's suggestion—

Mr. McCulloch: That is right, your Honor.

The Court: When did this mill first apply for a price?

Mr. McCulloch: Exhibit 8 is a letter from the West Side Lumber Company to the Office of Price Administration, Lumber Division, Washington, D. C., dated June 8th, 1944: "In accordance with request of Mr. Jerome S. Bischoff, of Portland, Oregon, O.P.A. office, we wish to submit the following request for special price authorization."

The Court: Now when did Patrick first know he was going to have trouble about this?

Mr. McCulloch: I shall ask Mr. Patrick to answer that.

Mr. C. C. Patrick: I was thinking about that. You say when I first knew?

The Court: First knew when you were going to have a claim against you.

Mr. Patrick: The first I knew was when Roger Jayne told us he thought we were going to have trouble on this car, that they were investigating it from the West Side Lumber Company; that the West Side Lumber Company had pulled some fancy trick or something, and the West Coast Lumber Association wanted them checked up, they were going to check that order and "I think you are going to have to revise your prices on it."

The Court: About when was that? [18]

Mr. Patrick: I was trying to think when that was, but I would guess that was right after receipt of that letter of August 3rd, because at that time I went down to his office and he showed me this letter from Peter Stone. I am not positive of the date I was over there. Maybe he will recall.

Mr. Bischoff: Mr. Jayne was here.

Mr. Patrick: Well, is that about right?

Mr. Bischoff: Well, I don't recall the exact time.

Mr. Patrick: I don't either.

Mr. Bischoff: Except it was shortly after the investigation of the sawmill.

The Court: All right. Then let's see if I understand the situation generally. The transaction was had in 1943 and completed?

Mr. McCulloch: That is right, in September and October.

The Court: And the following year, in the middle of the year, at the suggestion of Mr. Bischoff, the mill applied for a price, which was given?

Mr. McCulloch: Right, your Honor.

The Court: And this case is whether that price applies retroactively back to the transaction in 1943?

Mr. McCulloch: Correct.

The Court: Is that what this case is about?

Mr. Bischoff: Yes, your Honor. If I may make one statement here, your Honor may wonder—I know your Honor wonders—why [19] the request to the sawmill to file an application came at such a late date. The reason that it came at such a late date is that the Office of Price Administration does not know what goes on until it investigates the activities of what goes on and finds an item which it does not think conforms with the price regulation. At that time there takes place whatever investigation—

The Court: Now do I understand you to mean that it is the duty of all parties having to do with an item, a special item like this—

Mr. Bischoff: Yes.

The Court: —at the time before they handle it, to obtain a price?

Mr. Bischoff: Yes, your Honor.

The Court: Is that your theory?

Mr. Bischoff: Yes. I will just point it out. Section 12 (3) of the regulation—oh, 12 (3) (b): "As soon as the request has been filed, quotations and deliveries may be made at the requested price, but the final payment may not be made until the price has been approved. Action on the request may be by letter or telegram." That is, this section of the regulation is designed to take care of that multitude of special items which were created by the war demands. All kinds of novel specifications have been sold which were not sold in peacetime and it could not be anticipated what they were going to be and there was no method of pricing them except by special application, and, therefore, this provision [20] was incorporated requiring application.

The Court: Is there any place in the statute, or regulation, that says a man deals at his peril in a special as to which there was no prior ceiling price without first obtaining a price by application to the OPA?

Mr. Bischoff: Well, we think that this section I have just read to your Honor does that. And then the introductory section of the regulation

provides generally that no one may buy or sell at prices higher than those fixed by the regulation, or agree, offer, or attempt to do any of these things. We think that that provision requires a vendor to price by the regulation, and then we think that Section 12 requires a person who is selling an item which is not specifically priced to make an application and, as your Honor puts it, at his peril—generally at his peril. There is no way of telling in advance what the price will be until the application is made. Generally speaking, the Lumber Branch tries to apply the normal differential to fit these items, but a good share of the argument in this case will be the construction of Section 12 on that very point.

The Court: What did the mill base its price on? Who established it? Whose activity and ideas fixed the price?

Mr. Patrick: The mill initiated it. If you care to, I will be glad to tell you how it came up. At that particular time the Central Procurement Agency was having difficulty—

The Court: I think I will just swear you, Mr. Patrick. Raise [21] your right hand.

C. C. PATRICK

was thereupon duly sworn by the Court and testified as follows:

Mr. Patrick: At about that time the Central Procurement Agency was having difficulty getting enough one-inch boards and they were crowding the mills for delivery, deliveries of boards, and put

(Testimony of C. C. Patrick)

a restrictive order out requiring a certain percentage to be shipped or they would not release their orders. So this mill was trying to find some way to increase their production of boards. They are one of the circular head rig mills, which is a medium size or small mill. Their mill is not as accurate as the larger mill or better equipped mill, or the mill that has a band head rig, so there is a variance in size of the lumber as it comes from the head rig. I am talking about from the mill standpoint now, because it was argued with me that with their type of equipment they could not saw 3-inch accurately enough to insure resawing to one piece of 1-inch and two pieces of 2-inch. They didn't want to do it that way. That is the reason I remember it so distinctly. He said, "I could cut a 3-inch plank"—they had just bought a little resaw and they could put the little resaw in and resaw a 1-inch piece and the remaining piece be used for a 2-inch dimension.

The Court: I guess I won't take the time to develop this now. I think maybe a question will get what I want right now. The discussion between you and the mill fixed the price that was [22] used in this?

Mr. Patrick: No. No. The mill said, "Here is what I can do. I can get this piece of 1-inch and I can get a piece of 2-inch, which, on account of my variance in production, may not dress inch and five-eights, so I have got to sell it dressed inch and a half." And he said, "Here is what I have

(Testimony of C. C. Patrick.)

figured out in the way of prices. What do you think?" I said, "I don't know. Brushoff and Edwards will know much more about the price list than I do, so I will have to get them to check on it." He said, "I have had them check at two places in Eugene and these prices conform strictly with OPA ceiling regulation." So I wrote a memorandum, just what he would do, and sent it to our Portland office and Mr. Brushoff and Mr. Edwards both worked up the prices entirely separately, which came out slightly differently than the prices West Side had given, and they exchanged some correspondence back and forth as to details and finally came to an agreement on the prices. All four of them agreed that it did conform with ceiling requirements.

The Court: Did, or did not?

Mr. Patrick: They did. That is, the prices that were made in our formal order to them had been agreed upon before we sent it down as conforming with OPA ceiling prices.

The Court: All right.

Mr. Patrick: Also before we started shipping I called up two individuals in town who had a little connection with us and [23] asked them what they thought—

The Court: You will have an opportunity, of course, to cross examine.

Mr. Bischoff: Yes.

The Court: Now, Mr. McCulloch, let's finish.

Mr. McCulloch: Passing now until your Honor

wishes to rule on my request that the additional communications on the subject of this retroactive price between Mr. Bischoff or his office and Mr. Stone or his office be supplied for inspection to the defendant's attorneys—

The Court: Well, I will see how the trial shapes up tomorrow. Your records are here in town.

Mr. McCulloch: Very well.

The Court: We will see how the trial shapes up.

Mr. McCulloch: Very well. The defendant, or the defendant's attorneys, have not reached an agreement with Mr. Bischoff on the paragraph he has inserted in the tentative pre-trial order stating what C. F. Ranstrom, if called to testify as a witness, would state. That paragraph does state this: that the apparent source and motive and origin of this action came from the West Coast Lumbermen's Association and its Bureau of Grades, where this proposed witness was employed; and, furthermore, his testimony does not purport to connect up any of the lumber in the three cars that Patrick Lumber Company shipped that are involved [24] in this case with what the inspector found in connection with his inspection of the mill. Mr. Bischoff mentioned that but I wanted to make it plain to your Honor that the proposed stipulation in that respect has not been agreed to by the defendant.

Now Mr. Bischoff mentioned—

Mr. Bischoff: May I interrupt for one second? I don't like to interrupt but I just, in order that we may know whether we are going to have

a witness or not, I would like to know whether or not you would agree that if this witness were called this is what he would testify; but I don't want to ask you to stipulate away your right to object for grounds for failure to connect the evidence, and so on, but merely as to the substance of the statement.

Mr. McCulloch: Just a minute. I think, if the Court is to consider anything this man might say within his knowledge, he ought to be here, subject to cross examination, and I don't feel that we ought to agree with counsel's request in that respect. Now Mr. Bischoff mentioned for the first time—I haven't seen it before this morning—paragraph XI of the agreed statement of facts. It is very short, reading.

"That Patrick Lumber Company during the months of May or June, 1943, had filed with the Lumber Branch of the Office of Price Administration, a special price approval application for a special nonpriced item generally described in the application as New York Board of Transportation Ties." [25]

I had never heard of that before this morning. I showed it to Mr. Patrick. He said it wasn't true, and obviously we are not stipulating that as part of the agreed facts.

Mr. Patrick: Oh. I had better correct that. I didn't read it. I just saw that top that said I applied for a price on this item. All I said was I didn't apply for this one. We may have applied

for one to the New York Board of Transportation. But what has that got to do with this case?

Mr. McCulloch: Well, I will discuss this particular paragraph with Mr. Patrick further and with Mr. Bischoff later today. At the present time I am fully inadvised about what materiality it may have in this case. Now in the agreed conclusions of law, paragraph II, as Mr. Bischoff has run this up, reads: "Plaintiff, as Administrator of the Office of Price Administration, brought this action pursuant to the provisions of Section 205 (e) of the Emergency Price Control Act, as amended."

That just goes right to the heart of one of our contentions and we are not consenting that that is one of our agreed conclusions of law.

Paragraph IV of his agreed conclusions of law reads:

"That Revised Maximum Price Regulation 26, effective during the months of September and October, 1943, does not contain a dollar and cents price upon common or select grades of rough green Douglas Fir dimension lumber surfaced one side and two edges to 1½ inches, hit and miss, in standard widths of 4, [26] 6 and 8 inches."

I am uncertain myself just what interpretation the plaintiff would put on that language in that paragraph that I have just read. I think I know what plaintiff means. I think the plaintiff's interpretation and the defendant's interpretation, for that matter, are in direct conflict, and since the agreed evidence will be in this record on the trial of this case it is ample to enable the Court to draw

a sound and correct conclusion of what the Maximum Price Regulation does provide in that connection we are not agreeing with that either.

The Court: You are very flattering to me.

Mr. McCulloch: Well, I—

The Court: If you two can't agree it ought to be easy for me.

Mr. McCulloch: Now the last paragraph—no; the last sentence of paragraph VI of the agreed conclusion, "That the dollar and cents prices fixed by Revised Maximum Price Regulation 26, as amended, are applicable only to standard grades and specifications of lumber as defined by American Lumber Standards for Softwood and the Standard Grading and Dressing Rules of the West Coast Bureau of Grades and Inspection."

That, again, is in the category of paragraph IV that I have just mentioned. We are not agreeing with that conclusion, but the evidence in the record will be ample from which a conclusion, and a correct conclusion, can be deduced. [27]

Now as to the defendant's contentions of law, first, that "Defendant contends that Section 12 of Revised Maximum Price Regulation 26 is not applicable to the sales described in the complaint, for the reason that they are not included within the coverage of the provisions of Sub-section (a)."

That Subsection (a) reads:

"If a seller wishes to sell a grade which is not specifically priced in the price tables, or wishes to make an addition for special workings, specifications, services, or other extras for which addi-

tions are not specifically permitted, he must apply to the Lumber Branch," and so on.

That is one of our important contentions.

In that connection, I might say this, your Honor: That Section (a) reads, "If a seller wishes to sell a grade." Doubtless attorneys on both sides here will be making argument pro and con on the use of the word "grade" there. I am not going into that now, but it is obvious that both Mr. Bischoff and Peter Stone—Peter Stone in his letter in connection with the fixing of a retroactive, what he claims was a retroactive price on this lumber, confused the word "grade" as used in Section 12 there with the word "item," which hardly has the same legal significance. We claim that it does not.

Our second contention of law, "Defendant contends that a special price by the Office of Price Administration, pursuant to Section 12, after the sale and delivery of the lumber described [28] in the application, is not retroactive to or in force as of the date of the delivery." As I said before, that is one of our most important contentions.

And, third. "Defendant contends that the within action was instituted without authority, and that the Price Administrator could not legally delegate authority to institute said action to a Regional Enforcement Attorney or District Enforcement Attorney."

I don't need to elaborate that last contention, as your Honor knows what is involved there.

There is a further contention that is not put here, and that is that if it is not already covered

by one of the three I read—and perhaps it is—the provision of the statute in Section 205 (e) as amended does not authorize the Administrator to bring such an action as this. I think, as a matter of precaution, I will ask Mr. Bischoff—I will supplement our contentions of law with that. Now so far as—

The Court: What is your point on that?

Mr. McCulloch: The point in that is this—

The Court: Do you know his point?

Mr. Bischoff: No.

The Court: Are you prepared to discuss it?

Mr. McCulloch: This Section 205 (e) as amended reads:

“If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price, the person who buys such commodity for use or consumption, other than in the [29] course of trade or business, may, within one year,” and so on, bring an action.

Then down below, the same section says:

“If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price, and the buyer either fails to institute an action within thirty days, or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period.”

The Court: That is an amendment.

Mr. McCulloch: I know it is, your Honor. My point is the legal significance of the word “such” in that last sentence, “the Administrator my insti-

tute such action". If "such", referring back to the opening sentence in the section, relates to a sale of a commodity for use or consumption other than in the course of trade or business, then obviously on the facts the Administrator can't bring this action because he has alleged that the sale by the defendant was made to John Schroeder Lumber & Supply Company in the course of trade or business as it was, because the purchaser was a wholesale and retail lumber dealer in one of the Mid-Western states.

Now I don't want to argue the point, but have I sufficiently answered your Honor's question?

The Court: I have understood that the general construction of the Act was (at the outset, that a sale like this in the trade [30] to another wholesaler was actionable by the Administrator only. That was the tenor of the rulings under the Act as originally written, leaving to the consumer the right of action where a sale was to an ultimate consumer.

Mr. McCulloch: Yes; although—

The Court: Then the statute was amended and you have just read the amendment providing that if, in the consumer type of action, within thirty days, I believe, he did not sue, the Administrator might sue, and that is the present state of the statute.

Mr. McCulloch: Yes. I—

The Court: Now, but my understanding has been, from hearing a number of these cases, that in this type of sale to one in the trade, another

wholesaler, the action has always been in the Administrator.

Mr. McCulloch: I will say this, your Honor——

The Court: Now if I understand your point, it is that this Amendment has brought about some change other than has been presented to me before.

Mr. McCulloch: No. I would say that I would raise the same point and have the same grounds for making it under the original Section 205 (e) as under the amended Section 205(e). In other words, my point is, what the word "such" means when it says, toward the end of the section, "the Administrator may bring such action". Does it refer to the kind of action in the first part of the section that the ultimate consumer may bring? Does it refer to [31] the sale of a commodity made for use or consumption other than in the course of trade or business? Now this action here pending, on its face, is to recover treble damages for an overcharge of a commodity, lumber, sold, and alleged to be sold, in the course of trade or business. Now Judge Hall, in one of the——

The Court: Glick case.

Mr. McCulloch: In a lumber case——

The Court: Which nobody has followed.

Mr. McCulloch: I have seen it criticised in two decisions, your Honor.

The Court: There are more than that.

Mr. McCulloch: There probably may be, but if the point has no merit I don't think I will waste much time on it.

The Court: Anyhow, we have run your point down.

Mr. McCulloch: That, however, is what I had in mind.

The Court: All right. All right.

Mr. McCulloch: Now there is one thing more. When I prepared the defendant's answer in this case on October 14th of this year the provisions on the amendment of Section 205 (e) hadn't come to my attention. That contains this provision: That if the defendant proves that the violation of the regulations, order or price schedule in question was not willful, nor the result of a failure"—

The Court: Yes. You want to speak about that?

Mr. McCulloch: Either that, or I want to incorporate in the [32] pre-trial order—

The Court: Get them both.

Mr. McCulloch: Both?

The Court: Yes.

Mr. McCulloch: Then I will, with your Honor's leave—

The Court: And plead in the language of the statute.

Mr. McCulloch: I will amend in the language of the statute.

The Court: Be careful about that. Plead good faith and nonintention.

Mr. McCulloch: In the pre-trial order?

The Court: Yes.

Mr. McCulloch: I think that is all I have to say, then. Thank you.

The Court: All right. I will see you in the

morning. I want to ask you, Mr. Tongue, one thing: Are a great many more things involved in the action against the mill than these items that are being discussed?

Mr. Tongue: I will say this, your Honor: The suit against the mill involves two types of transactions. It involves one of those two types.

The Court: Is it a damage action?

Mr. Tongue: It is also a suit for treble damages, yes.

The Court: And for an injunction?

Mr. Tongue: No.

The Court: Just for damages? [33]

Mr. Tongue: That is correct. Is that not right, Mr. Bischoff?

Mr. Bischoff: Yes.

The Court: Well, how many cars are here, three?

Mr. Bischoff: Three, your Honor.

The Court: It involves those three cars?

Mr. Bischoff: Yes, your Honor.

Mr. Tongue: Yes, your Honor.

The Court: How many more cars than those three?

Mr. Tongue: Mr. Bischoff would be in a better position to say. Probably twenty cars.

Mr. Bischoff: More than that. It involves, I would say—

The Court: A number of different shipments?

Mr. Bischoff: Well, it would involve, of this class of transaction, probably fourteen, I think.

The Court: This same item?

Mr. Bischoff: Yes.

The Court: Sold through and to others?

Mr. Bischoff: All sold to Mr. Patrick.

The Court: Why didn't you sue Patrick for all of them?

Mr. Bischoff: Well, I guess we were tender-hearted, or something. I don't know. We waited around.

The Court: Did the statute of limitations have something to do with it?

Mr. Bischoff: The statute of limitations ran. We were aware of these transactions. [34]

The Court: All of the items then in the mill case were sold through Patrick?

Mr. Bischoff: Oh, no; no.

The Court: I mean items of this type?

Mr. Bischoff: Of this type.

The Court: Yes. And that was about how many cars?

Mr. Bischoff: About fourteen or sixteen cars.

Mr. Tongue: A total of fourteen.

The Court: And a total of about how many cars in Mr. Tongue's case?

Mr. Bischoff: In Mr. Tongue's case there were a total of about fourteen cars of this class, plus about eighteen or twenty cars of a second class.

The Court: About half of the cars in the case against the mill involve the same question as we have here?

Mr. Bischoff: Yes, that is correct.

The Court: Did you want to say something else?

Mr. Bischoff: There was just one minor prop-

osition. Number XI of the statement of facts, which refers to the special application having been filed by the Patrick Company on May or June of 1943, in order that we may minimize the question of proof, I would like to show Mr. Patrick a copy of a letter so we may stipulate the fact.

The Court: You state to Mr. Person what you agree about that. You can put in on the record.

Mr. Bischoff: All right.

The Court: And there is nothing more you want to say to me?

Mr. Bischoff: No, your Honor.

The Court: All right. In the morning, then, at ten o'clock.

(Thereupon, the foregoing hearing was concluded at 12:13 o'clock P. M.) [36]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that on Monday, December 4, 1944, I reported in shorthand all of the oral proceedings had upon a pre-trial conference in the above-entitled cause before the above-entitled Court, the Honorable Claude McColloch, Judge, presiding; that I thereafter caused my shorthand notes to be reduced to typewriting, and the foregoing and hereto attached thirty-six pages of typewritten matter, numbered 1 to 36, both inclusive, constitute a full, true and accurate

record of all of the oral proceedings had upon said pre-trial conference.

Dated at Portland, Oregon, this 6th day of December, A. D. 1944.

(Signed) ALVA. W. PERSON
Court Reporter

[Endorsed]: Filed Dec. 9, 1944.

[Title of District Court and Cause.]

Portland, Oregon, Tuesday, December 5, 1944.
10:22 o'clock A. M.

Before: Honorable Claude McCulloch,
Judge.

TRIAL PROCEEDINGS

The Court: Call a witness.

Mr. Bischoff: Do you have the answer yet, Mr. McCulloch? [1*]

Mr. William C. McCulloch: Yes. If your Honor please, pursuant to leave granted yesterday by the Court I would like at this time to tender defendant's amended answer.

The Court: Yes.

Mr. William C. McCulloch: I wish to say in this connection that I have set up in the amended answer the alleged lack of the Court's jurisdiction, based on the proposition of delegated authority

*Page numbering appearing at top of page of original Reporter's Transcript.

by the Administrator, in order to be sure to save that point.

The Court: Call your witness.

Mr. Bischoff: Mr. Jayne, please. Mr. McCulloch, do you have copies of the invoices of the Patrick Company?

Mr. William C. McCulloch: Yes.

Plaintiff's Evidence

ROGER JAYNE

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bischoff:

Q. Would you please state your name and occupation.

A. My name is Roger Jayne. I am now employed as investigator by the Office of Price Administration, Lumber Enforcement Unit.

Q. Prior to your employment by the Office of Price Administration what was your occupation?

A. Really before that I was a buyer for Patrick Lumber Company. [2]

Q. What experience have you had in the lumber business?

A. Well, I have been into the business for better than thirty years. During that time I have done everything from common labor to manager, the buyer of lumber from sawmills, and practically everything except the general manager.

(Testimony of Roger Jayne.)

Q. What sawmill did you run?

A. The last sawmill I was with was Bridge Lumber Company.

Q. What was your capacity there?

A. I was sales manager.

Q. Did you make the investigation in the Patrick Lumber Company case of three cars of lumber of scant dimension?

A. Just one portion of it.

Q. What portion was that?

A. Well, I made the original investigation where we located that car at the West Side and the final car was shipped. Beyond that I did nothing but figure up the charges, no part of the actual other investigation.

Q. Are you familiar with the grading rules of the West Coast Lumbermen's Association?

A. I think I am, sir.

Q. Have you ever been employed as a grader, yourself?

A. Yes. I had about four years with the Pacific Lumber Inspection Bureau.

Q. What is the Pacific Lumber Inspection Bureau?

A. That is an organization built up which controls the grading [3] and supervision of all the grading of lumber, particularly at that time—particularly for water-borne shipment, not so much for rail.

Q. Are you familiar with the American Lumber Standards for Softwood? A. Yes, sir.

(Testimony of Roger Jayne.)

Mr. Bischoff: At this time I would like to have introduced in evidence the Standard Grading and Dressing Rules for Douglas Fir Lumber, and the American Lumber Standards for Softwood Lumber. These two documents were stipulated as admissible in the pre-trial order. We have not reduced that order to writing yet, your Honor. We were not able to get together until late in the day yesterday.

The Court: Do you have an objection?

Mr. William C. McCulloch: No objection to this offer.

The Court: Admitted.

(The American Lumber Standards for Softwood Lumber, so offered and received, was marked Plaintiff's Exhibit 1; and the Standard Grading and Dressing Rules for Douglas Fir, etc., West Coast Bureau of Lumber Grades and Inspection, effective March 1, 1943, so offered and received, was marked Plaintiff's Exhibit 2.)

(Testimony of Roger Jayne.)

PLAINTIFF'S EXHIBIT No. 1

United States Department of Commerce

Harry Hopkins, Secretary

National Bureau of Standards

Lyman J. Briggs, Director

LUMBER

American Lumber Standards

For Soft Lumber

Simplified Practice Recommendation R16-39

[Supercedes R16-29 and Supplement]

Approved October 15, 1939

[Seal of Department of Commerce]

United States

Government Printing Office

Washington : 1940

MANUFACTURING CLASSIFICATION

104. Lumber is classified according to the extent to which it is manufactured as shown below:

Rough lumber.—Lumber undressed as it comes from the saw.

Surfaced lumber.—Lumber that is dressed by running it through a planer. It may be surfaced on one side (S1S), two sides (S2S), one edge (S1E), two edges (S2E), or on a combination of sides and edges: (S1S1E), (S2S1E), (S1S2E), or (S4S).

Worked lumber.—Lumber which has been run through a matching machine, sticker, or moulder. Worked lumber may be:

(Testimony of Roger Jayne.)

Matched lumber.—Lumber that is worked to provide a close tongue-and-groove joint at the edges or, in the case of end-matched lumber, at the ends also.

Shiplapped lumber.—Lumber that is worked to provide a close rabbeted or lapped joint at the edges.

Patterned lumber.—Worked Lumber that is shaped to a patterned or moulded form.

MAINTENANCE OF SIZE AND GRADE STANDARDS

105. The principle of responsibility of the entire organized lumber industry for the maintenance of agreed upon and published size, grade, and inspection standards is recognized, and for the suitable discharge of such responsibility the Central Committee on Lumber Standards shall be continued. In pursuance of these objectives the regional associations shall file with the Central Committee on Lumber Standards their grading rules and such amendments thereto as they may propose from time to time for review and approval as conforming to American Lumber Standards.

106. Rules for grading one or more species to provide American standard lumber as herein defined, supplemented with the applicable lumber inspection, shipping, and general provisions, may be published by any association of manufacturers having adequate facilities for mill and claim inspection, as conforming to American Lumber Stand-

(Testimony of Roger Jayne.)

ards, after their conformity to the requirements of these standards shall have been determined by the Central Committee on Lumber Standards.

107. So far as it is within their power, the associations within the lumber industry shall undertake, through association grades and inspection service, arbitration, and, if practicable, through grade marking and otherwise, to maintain for the benefit of the lumber-using public the standards of size and basic grade names and classifications as agreed upon and as published in the association grading and inspection rules.

108. The associations which make grading rules and conduct lumber inspection service shall maintain such size, grade, and inspection standards as may have been agreed to.

109. Each such association shall assume responsibility for the maintenance, in the manner herein outlined, by its individual members or subscribers, of said size standards, basic grade classifications, and inspection standards.

110. The formulation of regulations for the conduct of inspection to procure the application of the grading rules published by lumber associations, and the administration, supervision, and conduct of inspection service, shall be exclusively by the lumber industry.

GRADE MARKING

111. The principle and practice of grade marking lumber are approved.

(Testimony of Roger Jayne.)

112. The grade marking of each species of lumber shall be under the supervision, including regular grading supervision at the mills, of the regional manufacturers' association responsible for the formulation and maintenance of grading standards for each species.

All pieces or bundles of a given grade shall be grade marked (except that unavoidable mechanical skips are allowed).

An easily distinguishable mark or insignia, copyrighted and symbolizing association grading supervision and the American Lumber Standards, shall be used in conjunction with the grade mark for each species of lumber. Such marks shall be available to those mills which are able to prove their efficiency in grading according to the rules of the regional manufacturers' association and which agree to maintain the established standards of size and grade and to submit their lumber products to official association inspection, both at the mill and upon complaint at destination. The grade as marked shall signify that the lumber conforms to the grade specification of the rules under which it is graded.

An easily distinguishable, copyrighted, and nationally uniform mark, to be provided by the Central Committee on Lumber Standards, shall be available under such equitable conditions as the committee may determine for use in conjunction with regional manufacturers' association grade marks to identify American standard lumber.

(Testimony of Roger Jayne.)

Each regional manufacturers' association shall maintain a bona fide supervisory inspection service, under which each mill authorized to use the copyrighted association symbol in conjunction with the grade mark will be checked regularly as to grading efficiency, and conformity to all the established rules for grade marking.

In pursuance of the responsibility of the Central Committee on Lumber Standards to maintain the American Lumber Standards, each regional manufacturers' association shall submit its procedure with respect to grade marking to the committee for approval.

113. In order to encourage the maintenance of standard sizes as agreed to, lumber manufactured and sold as standard, if grade marked, shall be marked by an appropriate brand or insignia to indicate that it is of standard size.

GENERAL GRADING RULE PROVISIONS

Size and Grade

114. To the extent to which differences in the characteristics of species in quality of logs, in conditions of manufacture, and in the uses to which the product is put, will, in practical application, permit, the basic provisions for the grading of lumber shall be uniform.

115. Lumber not conforming to standard sizes or grades and that intended for special uses shall be covered by special contract and inspection.

116. The characteristics and limitations in any

(Testimony of Roger Jayne.)

grade or species vary as to the area of the piece to be graded increases or diminishes with respect to the basic size or area specified, but their size shall not exceed that permitted in the respective grading rules.

117. Whenever any characteristics other than those defined in regional association grading rules are encountered, they shall be regarded as equivalent (equal) to permitted characteristics or prescribed limitations in proportion to their effect on the strength, appearance, or other utility value of the piece in the grade under consideration.

118. Characteristics permitted and limitations prescribed in rough lumber shall be the same as those applying to dressed lumber of like kind and grade, and, in addition, such others as will disappear in dressing such lumber to standard sizes shall be allowed.

119. Mixed grades, other than the two highest recognized grades for each species, not specifying the proportion of each grade, are not American standard grades.

120. Specifications dealing with lumber seasoning and moisture content shall be developed by each regional manufacturers' association in accordance with its own conditions and the requirements of the users of its products. Such specifications adopted from time to time by any regional association shall be filed with the Central Committee on Lumber Standards for approval. Each association publishing grade rules shall include definitions of any

(Testimony of Roger Jayne.)

terms used therein to describe condition of seasoning, such as air dry, kiln dry, shipping dry.

121. In addition to meeting its grade specifications, lumber shipped shall conform to such grain, heartwood, sapwood, moisture content, or other specifications as may have been agreed to in the contract of purchase and sale.

Description, Measurement, and Tally

122. To be standard, lumber shall be described by the thicknesses and widths specified in paragraphs 209, 304, and 402. Lumber of other sizes shall be considered special.

123. The dressed dimensions specified in paragraphs 209 and 304 shall apply to lumber in the condition of seasoning as sold and shipped.

124. Board measure is the term used to indicate that a board foot is the unit of measurement of lumber. A board foot is the quantity of lumber contained in, or derived from, by drying, planing, or working, or by any combination of these means, a piece of rough green lumber 1 inch thick, 12 inches wide, and 1 foot long, or its equivalent in thicker, wider, narrower, or longer lumber.

125. Except moulding, which shall be tallied in linear feet, lumber shall be tallied board measure. The measurement of rough dry or dressed lumber shall be based on the corresponding nominal dimensions of rough green lumber. The measurement of lumber of thickness less than 1 inch shall be based on the surface dimensions; i. e., width and length.

126. To determine the board-foot contents of

(Testimony of Roger Jayne.)

lumber thicker than 1 inch, the surface measure shall be multiplied by the nominal thickness in inches and fractions of an inch.

127. Lumber finished to special size shall be tallied as of the standard rough size necessarily used in its manufacture.

128. Lumber of stock sizes shall be tallied by the number of pieces of each size and length in the shipment.

129. Lumber shipped on the basis of board measure shall be tallied by the number of pieces and of board feet in each piece.

General Provisions

202. The rules for yard lumber shall prescribe the number, extent, and limitations of the characteristics permitted in the poorest pieces admissible in each grade. A grade shall be representative, however, and shall not comprise only low-line pieces.

203. Except in dimension and timbers, the grade of yard lumber, rough or surfaced two sides, shall be determined from the better or face side of the piece, and lumber which is surfaced one side only shall be graded from the surfaced side.

204. The grading of lumber cannot be considered an exact science, because it is based on a visual inspection of each piece and on the judgment of the grader. Grading rules, however, shall be sufficiently explicit to establish 5 percent below grade as a reasonable variation between graders.

(Testimony of Roger Jayne.)

SIZE STANDARDS

Dressed Sizes

205. The terms "standard yard board" and "standard industrial board", and "standard yard dimension" and "standard industrial dimension" shall be the designations for 1-inch boards and 2-inch dimension, respectively.

206. 25/32 inch, S1S or S2S, shall be the minimum thickness for the standard yard board; 26/32 inch, S1S or S2S, for the standard industrial board.

207. 1-5/8 inches, S1S or S2S, shall be the minimum thickness for standard yard dimension not more than 12 inches wide; 1-3/4 inches, S1S or S2S, for standard industrial dimension.

208. The minimum finished widths of finish S1E or S2E shall be 3/8 inch off on lumber of standard width of 3 inches; the finished widths of finish S1E or S2E shall be 1/2 inch off on lumber of standard widths of 4 to 7 inches, inclusive, and 3/4 inch off on lumber of standard widths of 8 to 12 inches, inclusive; and the finished widths of strips, boards and dimension S1E or S2E shall be 3/8 inch off on lumber of standard widths less than 8 inches, and 1/2 inch off on lumber of standard widths of 8 to 12 inches.

209. The minimum thickness and widths of finished lumber, S1S, S2S, S-E, S2E, or any combination thereof, shall be as follows:

(Testimony of Roger Jayne.)

Strips, boards, and dimension

(The thicknesses apply to all widths and the widths
to all thicknesses)

Product	Thickness			Width	
	Board measure	Minimum dressed dimensions		Board measure	Minimum dressed dimensions—standard
		Yard standard	Industrial standard		
	Inches	Inches	Inches	Inches	Inches
Finish		5/16	.....	3	2-5/8
.....		7/16	.....	4	3-1/2
.....		9/16	.....	5	4-1/2
.....		11/16	.....	6	5-1/2
.....	1	25/32	26/32	7	6-1/2
.....	1-1/4	1-1/16	.....	8	7-1/4
.....	1-1/2	1-5/16	.....	9	8-1/4
.....	1-3/4	1-7/16	.....	10	9-1/4
.....	2	1-5/8	1-6/8	11	10-1/4
.....	2-1/2	2-1/8	.....	12	11-1/4
.....	3	2-5/8	.....	....	.....
Common: Strips and boards	1	25/32	26/32	3	2-5/8
.....	1-1/4	1-1/16	.....	4	3-5/8
.....	1-1/2	1-5/16	.....	5	4-5/8
.....	.....	.....	.....	6	5-5/8
.....	.....	.....	.....	7	6-5/8
.....	.....	.....	.....	8	7-1/2
.....	.....	.....	.....	9	8-1/2
.....	.....	.....	.....	10	9-1/2
.....	.....	.....	.....	11	10-1/2
.....	.....	.....	.....	12	11-1/2
Dimension	2	1-5/8	1-6/8	2	1-5/8
.....	2-1/2	2-1/8	.....	4	3-5/8
.....	3	2-5/8	.....	6	5-5/8
.....	4	3-5/8	.....	8	7-1/2
.....	.....	.....	.....	10	9-1/2
.....	.....	.....	.....	12	11-1/2

(Testimony of Roger Jayne.)

Mr. Bischoff: If the Court please, we are going to ask leave to withdraw the copy of Lumber Standards and substitute in its [4] place a photostatic copy of the pages which become pertinent here.

The Court: That is satisfactory.

Mr. Bischoff: At this time, may it please the Court, I offer in evidence three invoices of the Patrick Lumber Company, which, by stipulation, are taken as admissible.

The Court: Admitted.

(The invoice of Patrick Lumber Company dated October 7, 1943, to John Schroeder Lumber & Supply Company, so offered and received, was marked Plaintiff's Exhibit 3; the invoice of Patrick Lumber Company dated September 16, 1943, to John Schroeder Lumber & Supply Company, so offered and received, was marked Plaintiff's Exhibit 4; and the invoice of Patrick Lumber Company dated September 3, 1943, to John Schroeder Lumber & Supply Company, so offered and received, was marked Plaintiff's Exhibit 5.)

(Testimony of Roger Jayne.)

PLAINTIFF'S EXHIBIT No. 3

Invoice

PATRICK LUMBER CO.
 Terminal Sales Building
 Portland 5, Oregon

October 7, 1943

Sold to: John Schroeder Lumber & Supply Co.,
 306 E. Walnut Street
 Milwaukee, Wisconsin

Ship to: Same

Terms: Less 4% and 2% ADF 5 days

Order No.: 8358
 Your No.:
 F.O.B.: 75½¢ rate
 Car No.: Wab 45712
 Route: SP GN MinnTfr
 CMStP&P

DOUGLAS FIR S1S H&M to 1½" S2E to Std GREEN

SEL STR	2x4	2/6 8/8 7/10 32/12 8/14 11/16 1/18 7/20 3/22	651'	\$50.50	\$32.88
	2x6	2/6 7/8 3/10 16/12 9/14 11/16 7/18 1/20	738	51.25	37.82
	2x8	1/8 3/10 22/12 6/14 8/16 3/18 1/20	784	50.25	39.40
SEL MER	2x4	9/6 31/8 22/10 67/12 18/14 30/16 5/18 9/20	1552	48.50	75.27
	2x6	4/6 2/8 6/10 27/12 10/14 16/16 3/18 4/20 1/24	954	49.25	46.98
	2x8	1/6 7/8 4/10 51/12 11/14 15/16 7/18 7/20	1832	48.25	88.39
PAR 215	2x4	8/6 35/8 31/10 124/12 56/14 96/16 30/18 32/20 12/22 4/24	3751	47.50	178.17
	2x6	3/6 1/8 7/10 59/12 28/14 45/16 29/18 4/20 3/22 4/24	2518	48.25	121.49
	2x8	7/6 17/8 35/10 95/12 35/14 44/16 24/18 18/20	4872	47.25	230.20
#2 COM	2x4	7/6 43/8 36/10 135/12 47/14 77/16 29/18 48/20 7/22 3/24	3825	43.50	166.39
	2x6	7/10 82/12 33/14 45/16 15/18 10/20 2/22 1/24	2706	44.25	119.74
	2x8	8/6 22/8 72/10 270/12 67/14 111/16 60/18 84/20	12877	43.25	556.93
			37749'		\$1728.02

The lumber covered by this invoice, unless otherwise shown on order is sold on standard grades of West Coast Lumbermen's Association.

If the buyer shall pay by check, draft, note, or any other mode than cash, such payment shall be deemed conditional and for the convenience of the buyer, and shall not be deemed a payment until cash or solvent credit shall have been received and accepted by the seller at its home office.

The seller, may, for the purpose of facilitating collection, deposit any such check or instrument in any bank for collection and such bank and/or other banks acting in any capacity in such collection shall be considered the agent of the buyer and may forward such check or instrument direct to the bank at or by which it is payable, and may accept payment in exchange upon any solvent bank.

(Testimony of Roger Jayne.)

PLAINTIFF'S EXHIBIT No. 4

Invoice

PATRICK LUMBER CO.
 Terminal Sales Building
 Portland 5, Oregon

September 16, 1943

Sold to: John Schroeder Lumber & Supply Co.
 306 E. Walnut Street
 Milwaukee, Wisconsin

Order No.: 8358
 Your No.
 F.O.B.: 75½c Rate
 Car No.: NP 12494
 Route: SP GN MINN TFR
 CMSnP&P

Ship to: Same

Terms: 4% and 2% 5 days after arrival, 60 days net

DOUGLAS FIR S1S H&M TO 1½ S2E STD. GREEN

SEL STR	2x4	2/8 2/10 7/12 2/14 7/16 1/18 6/20	265'	\$50.50	\$13.38
	2x6	1/8 17/12 5/16 1/20	312	51.25	15.99
		1/22	22	53.75	1.18
	2x8	1/8 3/10 28/12 8/14 9/16 8/18 2/20	1085	50.25	54.52
		2/22 2/24	123	52.25	6.43
SEL MER	2x4	5/8 1/10 27/12 7/14 12/16 4/18 9/20	611	48.50	29.63
		1/22	15	52.00	.78
	2x6	1/8 1/10 39/12 6/14 17/16 5/18	932	49.25	45.90
		2/22	44	51.75	2.28
SEL MER	2x8	5/8 5/10 68/12 22/14 18/16 20/18 10/20	2749	48.25	132.64
		5/22 3/24	243	50.25	12.21
PAR 215	2x4	7/8 7/10 70/12 15/14 34/16 10/18 13/20	1440	47.50	68.40
		11/22 3/24	209	51.00	10.66
	2x6	4/8 7/10 51/12 16/14 43/16 9/18 7/20	1928	48.25	93.03
		5/22 1/24	134	50.75	6.80
	2x8	2/6 12/8 15/10 152/12 74/14 65/16 53/18 26/20	7509	47.25	354.80
		15/22 7/24	664	49.25	32.70
#2 COM	2x4	8/8 8/10 110/12 30/14 70/16 14/18 15/20	2371	43.50	103.14
		12/22	176	47.00	8.27
	2x6	3/8 1/10 76/12 31/14 57/16 22/18 9/20	2868	44.25	126.91
		14/22 5/24	428	46.75	20.01
	2x8	5/6 19/8 38/10 287/12 95/14 109/16 57/18 54/20	12248	43.25	529.73
		27/22 20/24	1432	45.25	64.80
			37808'		\$1734.19

The lumber covered by this invoice, unless otherwise shown on order is sold on standard grades of West Coast Lumbermen's Association.

If the buyer shall pay by check, draft, note, or any other mode than cash, such payment shall be deemed conditional and for the convenience of the buyer, and shall not be deemed a payment until cash or solvent credit shall have been received and accepted by the seller at its home office.

The seller, may for the purpose of facilitating collection, deposit any such check or instrument in any bank for collection and such bank and/or other banks acting in any capacity in such collection shall be considered the agent of the buyer and may forward such check or instrument direct to the bank at or by which it is payable, and may accept payment in exchange upon any solvent bank.

(Testimony of Roger Jayne.)

PLAINTIFF'S EXHIBIT No. 5

Invoice

PATRICK LUMBER CO.
 Terminal Sales Building
 Portland 5, Oregon

September 3, 1943

Sold to: John Schroeder Lumber & Supply Co.
 306 E. Walnut Street
 Milwaukee, Wisconsin

Ship to: Same

Terms: 4% and 2% 5 days after arrival,
 60 days net, ADF

Order No.: 8358
 Your No.
 F.O.B.: 75½c Rate
 Car No.: NP 17862
 Route: SP GN MINN TFR
 CMSI P&P

DOUGLAS FIR SIS TO 1½" H&M S2E STD. GREEN

SEL STR	2x4	2/8 8/10 9/12 6/14 4/16 1/18 1/20 2/22	260' 29	\$50.50 54.00	\$13.13 1.57
	2x6	1/6 1/8 5/10 5/12 2/14 2/16 1/18	202	51.25	10.35
	2x8	3/6 9/8 10/10 39/12 16/14 16/16 2/18 1/20 6/22 3/24	1592 272	50.25 52.25	80.00 14.21
SEL MER	2x4	5/8 2/10 12/12 12/14 9/16 2/18 2/20 6/22	395 88	48.50 52.00	19.16 4.58
	2x6	8/8 9/10 19/12 6/14 6/16 1/18 3/20 2/22	640 44	49.25 51.75	31.52 2.28
SEL MER	2x8	4/6 20/8 23/10 125/12 49/14 57/16 13/18 9/20 8/22 5/24	5235 395	48.25 50.25	252.59 19.85
PAR 215	2x4	5/8 5/10 30/12 13/14 27/16 4/18 8/20 4/22 1/24	864 75	47.50 51.00	41.04 3.83
	2x6	7/8 7/10 26/12 20/14 34/16 8/18 3/20 11/22	1466 242	48.25 50.75	70.73 12.28
	2x8	4/6 20/8 16/10 194/12 90/14 145/16 58/18 37/20 41/22 19/24	10715 1811	47.25 49.25	506.28 89.19
#2 COM	2x4	5/8 11/10 28/12 25/14 21/16 9/18 8/20 11/22 2/24	996 193	43.50 47.00	43.33 9.07
	2x6	2/8 3/10 37/12 5/14 19/16 2/18 1/20 4/22	920 88	44.25 46.75	40.71 4.11
	2x8	16/8 19/10 221/12 69/14 101/16 44/18 34/20 58/22 36/24	9365 2853	43.25 45.25	405.04 129.10
				38740'	\$1803.95

The lumber covered by this invoice, unless otherwise shown on order is sold on standard grades of West Coast Lumbermen's Association.

If the buyer shall pay by check, draft, note, or any other mode than cash, such payment shall be deemed conditional and for the convenience of the buyer, and shall not be deemed a payment until cash or solvent credit shall have been received and accepted by the seller at its home office.

The seller may, for the purpose of facilitating collection, deposit any such check or instrument in any bank for collection and such bank and/or other banks acting in any capacity in such collection shall be considered the agent of the buyer and may forward such check or instrument direct to the bank at or by which it is payable, and may accept payment in exchange upon any solvent bank.

(Testimony of Roger Jayne.)

The Court: How many exhibits do you have?

Mr. Bischoff: Very few.

The Court: Put them in en masse and have them all marked the same as at pre-trial.

Mr. Bischoff: We denominated the exhibit numbers in the draft of pre-trial order, and I think if we keep those numbers it will be easier for the record. [5]

The Court: That is the way it is always done. Put in all the exhibits on both sides, and later you can get them marked, Mr. Person. He will give them the same numbers as at pre-trial. Go on.

Mr. Bischoff: Q. I would like to call your attention to the invoices from Patrick Lumber Company to the Schroeder Lumber Company which have been introduced in evidence.

Mr. Howard T. McCulloch: If the Court please, many is objected to on the ground—the lack of jurisdiction the record might show all of this testimony is objected to on the ground—the lack of jurisdiction for the Court to try this case, without repeating it.

The Court: It will be received subject to that objection.

Mr. Bischoff: Could I ask you to hand the copies of the invoices to Mr. Jayne, and the two exhibits that you have, the grading rules.

Q. I call you attention to the description of the lumber contained in those invoices; that is, Douglas Fir Lumber S1S to 1½ inches, hit and miss, S2E,

(Testimony of Roger Jayne.)

standard green. Will you please tell the Court what that nomenclature means.

The Court: How does he know what it means? He didn't write the invoices.

Mr. Bischoff: Q. Are you familiar with the language in that description?

A. It is ordinary language, used in all invoicing. [6]

Q. Is that common language used daily in the lumber trade?

A. All except the one inch and a half. That is the only thing that is different from the ordinary lumber trade.

Q. What I mean is, are the terms standard terms?

A. Well, they are standard terms.

Q. Would you please tell the Court what those terms mean in the trade?

A. What they mean is, this lumber has been surfaced to one and one-half inch in thickness, and that in turn has been surfaced, the two edges have been surfaced to the standard, American Lumber Standards, and the hit and miss, H&M there, is the ordinary term for hit and miss when there would be a few skips in the surfacing of the piece.

Q. What does the term S1S mean?

A. Surfaced one side.

Q. And S2E?

A. Surfaced two edges—surfaces.

A. And the term standard—"Str"?

(Testimony of Roger Jayne.)

A. That means what is specified in all the grading rules as to what is standard practice.

Q. On the invoices there are the terms select structural, select merchantable—rather, they are abbreviated terms, "SEL", then the abbreviation "STR", then "SEL MER".

A. First is an abbreviation for select structural, the second is select merchantable, the third one is paragraph 215; the fourth [7] one is No. 2 common.

Q. Now to what do these terms refer?

A. They refer to the regular grades in your regular grading rules. They are standard grades.

Q. By the regular grading rules, you mean Exhibit No. what?

A. The same as we have here in this Number 12. It does not mention those in this particular one, but those are standards of all shipping contracts.

Q. What are the exhibit numbers on that document you hold up?

A. Exhibit No. 2.

Q. Do you know whether or not there is contained in Exhibit No. 2 a description of any item of lumber which is surfaced one side to one and a half inches hit and miss, surfaced two edges?

A. No. there is nothing in the rules calling for that at all. That is what we call a special grain, substandard; there are various phrases that are used in that connection. It is not a standard surfacing.

Mr. Howard T. McCulloch: If the Court please.

(Testimony of Roger Jayne.)

I object to that answer as not being responsive to the question.

The Court: It may stand.

Mr. Bischoff: Would you please refer to the paragraph of the grading rules which defines standard thicknesses. Give the page reference.

A. I will have to look a little.

Q. You will find it in the rear of the book, just alongside of [8] the abbreviations.

A. Well, on page 142 the standard thickness for dimension here is mentioned as inch and five-eighths.

Q. Is that surfaced or rough?

A. Surfaced one side or two sides, S1S or S2S. That is the thickness.

Q. Is that clean surfacing?

A. Well, that is permitted in the rules.

Q. What is the rough width—

A. Nominal.

Q. —on dimension lumber?

A. Well, it is always on the even 2 inches.

Q. Is that what the rule provides?

A. Yes, it is here, nominal width.

Q. What page of the rules is that on?

A. Page 142.

Q. Please refer to the American Lumber Standards, the section on standard widths and thicknesses for dimension lumber.

A. On page 9, 2-inch dimension, it is to be surfaced what is called the yard standard.

Q. Would you please speak a little louder?

(Testimony of Roger Jayne.)

A. On page 9 of Exhibit 1, 2-inch dimension is to be inch and five-eighths.

Q. Do you know whether or not, Mr. Jayne, that dimension lumber surfaced to $1\frac{1}{2}$ inches one side only is commonly known as [9] scant dimension?

A. That is the usual term.

Q. Is that lumber accepted for building standards by the FHA, for example, as standard lumber?

Mr. Howard T. McCulloch: Now if the Court please, I object to that. The witness is not qualified to answer—is not shown to be qualified—as to whether it is or is not accepted by the Federal Housing Administration, for example.

The Court: He may answer, subject to the objection. Go ahead.

A. I am not qualified. I don't know whether—I have heard that, but I do not know directly it has been. I have had lots of conversations with men on the West Coast. Whether they have—

The Court: Well, that is out. Stricken.

Mr. Bischoff: I believe that we have an agreement, Mr. McCulloch, that the arithmetic of the overcharges as set forth in the complaint is stipulated as correct and there is no need to examine this witness on the method of arriving at the—

Mr. Howard T. McCulloch: Alleged overcharges?

Mr. Bischoff: Yes.

Mr. William C. McCulloch: That is correct, your Honor.

Mr. Bischoff: That is all.

(Testimony of Roger Jayne.)

Mr. Howard T. McCulloch: No cross examination.

The Court: Now you might tell me what you claim for the testimony of each witness. Sum it up. [10]

Mr. Bischoff: The summary to this is that the item sold is a special item, which is not within the meaning of the definition of standard dimension lumber either under the Grading rules, the American Lumber Standards, or trade practice. It is a special item, non-standard, and then at the time of argument we will develop the argument from the rules themselves.

The Court: Well, how about this distinction between an "item" and "grade" that was discussed yesterday?

Mr. Bischoff: Oh.

Q. Mr. Jayne, will you please indicate whether or not the term "grade", or indicate what the term "grade" denotes. Does it indicate quality only, or does it indicate quality in relation to a specific item?

A. In all the years I have been in lumber every grade is based on the number of defects allowed according to the size. In other words, you will have a certain size defect, a certain size knot as specified. If it is a 2 by 4 I think it is inch and a half. No. 1 common, 2 by 12 will take 2 to $2\frac{1}{2}$ to 3 inch knot. I have never graded lumber except the grade of No. 1 clear. Every basis and part of the grade is the size of the piece.

(Testimony of Roger Jayne.)

Q. Now are the rules in the book set up with relation to the specific sizes and classes of lumber?

A. Particularly in all your clear construction lumber. The revised—the grades have been brought up for the last ten years, so that each and every grade specifies distinctly the size. [11]

The Court: What kind of lumber was this?

Mr. Bischoff: Fir; Douglas Fir.

The Witness: You are referring to my construction lumber?

The Court: What kind of lumber was this in these invoices?

A. This is what they call construction lumber.

The Court: What kind of lumber was it?

A. Douglas Fir Lumber.

The Court: How many grades of Douglas Fir lumber are there, about how many?

A. Well, the common grades alone, there are eight grades.

The Court: About how many are there altogether?

A. Well, we would be probably told, without the special grades, in the ordinary sense of the word about fifteen grades.

The Court: A great many more in pine?

A. Yes, sir; very many. Pine is much more refined than fir.

The Court: Probably be ten times as many in pine?

A. I am not familiar enough with pine to answer that question.

(Testimony of Roger Jayne.)

The Court: Is this common lumber?

A. This is common lumber.

The Court: There are five grades in common?

A. No. There are about seven or eight. It runs from No. 2 up, and select structural, and there are a number of grades.

The Court: What grade was this in the shipment?

A. The shipment here is specified select structural, select merch, Paragraph 215, No. 2 common; and all three invoices are identical [12] on the grades.

The Court: Now what is your point, Mr. Bischoff? What is your point that there was no ceiling price ascertainable at the time of the shipment?

Mr. Bischoff: Well, that will be developed in the argument. The point on this case is that the price regulation itself, which sets up tables, for various items as dollars and cents prices, when for the standard items of lumber they are defined in the grading rules, as, for example, standard common grade, standard clears, various sizes and the like. Then in addition the price regulation has a provision for extra workings; as, for example, if a piece is to be center matched, or run with a bevel edge, or if it is a special length, and so on, it is provided for a price in addition, but there is no provision in R.M.P.R. Rule 26 for an item other than a standard item.

(Testimony of Roger Jayne.)

The Court: Was there a price for all of the seven grades of common lumber in fir?

Mr. Bischoff: Yes, sir.

The Court: And this is not one of them?

Mr. Bischoff: It is not.

The Court: He has not said that, has he?

Mr. Bischoff: No, he has not.

The Court: He said the contrary, didn't he?

Mr. Bischoff: No, I don't believe so. I don't believe he said anything on that subject. He has discussed only what has [13] been in the grading rules and in the American Softwood Standards, but not what goes in the price tables.

Q. Mr. Jayne, I hand you a copy of R.M.P.R. 26 and ask you to state what this is.

The Court: Well, just a minute now. These were billed as certain grades of lumber known to the trade?

Mr. Bischoff: That is correct.

The Court: But you say they were not up to the billing?

Mr. Bischoff: No, we are not making that claim here. This lumber was billed out as a specific grade, we will say No. 1 common, for example, dimension lumber, surfaced to $1\frac{1}{2}$ inches, surfaced one side only. Now the grading rules define dimension lumber in terms of either rough dimension or surfaced dimension, on certain standards and to certain widths and to certain thicknesses. The term No. 1 common, 2 by 4, for example, in the grading rules mean a 2 by 4 which is $1\frac{5}{8}$ in thickness, sur-

(Testimony of Roger Jayne.)

faced by the standard width and of a quality with so many knots or pitch pickets, and stress and strain requirements, and so on, but there is nothing in the rule book which described an item of lumber which is surfaced to $1\frac{1}{2}$ inches of dimension quality. It is just an unknown item. There just isn't such a bird and it does not appear in the rule book.

Now the price regulation which we are tendering has a table for dimension lumber. It says the price of No. 1 common dimension lumber, for example, random width, may be \$28.50 per thousand; then it will say for select merch, or for select structural, certain additions may be made, or if the grade is dropped to No. 2 the price is lowered. Then it has specifications for length. And that table is applicable only to standard dimension lumber. There is no possible way of figuring the price of any non-standard item from that table, except in the case of some special working which a customer might order. And we argue from that, that since that table does not cover the item it is necessary to file a special application for a price.

Now these tables—it might be a good idea for your Honor to take a look at any one of them at this time—are set up in dollars and cents terms for grades of standard items, but they don't deal with anything except the standard item and the regulation itself makes reference to and incorporates within the regulation the grading rules by

(Testimony of Roger Jayne.)

number, and which are based upon the American Softwood Standards.

The Court: Mr. McCulloch, are you going to have the people here that figured the ceiling price on this shipment for Mr. Patrick? Are you going to have the people here that did that?

Mr. Howard T. McCulloch: It is my impression that Mr. Patrick, from what he said yesterday, figured those himself, with some of his associates.

Mr. Patrick: No. I checked it. I didn't figure it.

Mr. Howard T. McCulloch: I see. That is as far as I know we are going. [15]

The Court: Can you talk as technically about this as Mr. Bischoff can, or, if you can, tell me your side now.

Mr. Patrick: Yes, I can.

The Court: Maybe you can.

Mr. Howard T. McCulloch: I would like to ask the witness a question or two. I will go as far as I can. If I don't know I will say so.

The Court: Go ahead and finish, Mr. Bischoff.

Mr. Bischoff: I would like to hand to your Honor a copy of R.M.P.R. 26 so you can follow this along, if you would like to see it.

The Court: I don't want to see it now.

Mr. Bischoff: Q. Mr. Jayne, please refer to Table 2 covering dimension lumber.

The Court: Have you and your side known what they are going to claim about this?

(Testimony of Roger Jayne.)

Mr. Howard T. McCulloch: Yes, sir, your Honor.

Mr. Bischoff: Q. Do you notice the heading to that table, "No. 1 Green, Rough, or surfaced 4 sides, A.L.S."? Now what does "A.L.S." mean?

A. American Lumber Standards.

Q. Then underneath there is a horizontal column of figures, the first of which reads "6 to 20 feet," and then following that are figures, 6 feet, 8 feet, 9 feet, 10 feet, 12 feet, and so on. Will you please indicate what those figures mean? [16]

A. The first figures of 6 to 20 is random length shipment. Those figures are headings, 6, 8, 9, 10, 12, and so forth. If you have the specified lengths in an order calling for a certain number of pieces it would be priced upon those prices set in those columns.

Q. Underneath that horizontal column is a series of figures reading as follows: 2 by 2; 2 by 3; 2 by 4; 2 by 6; 2 by 8, and so on. What does that series refer to?

A. That refers to the size lumber that it is possible to be shipped.

Q. That is, are those the sizes within the dimension class?

A. They are. They are dimension sizes.

Q. Opposite those classes there are dollar and cents figures. What are those?

A. That is figuring out the relative valuation of each size and each length throughout.

(Testimony of Roger Jayne.)

Q. By relative valuation, you mean the price, the ceiling price?

A. Yes, the price; the price value.

Q. Now underneath this table is a series of notes headed "Grades." What is the significance of that series of notes?

A. You take the first, your table is set for No. 1 common dimension, and when they come down and refer to grades they refer to the additions or deductions which are to be made from the No. 1 common that is shipped.

Q. Now following that is another group of notes headed "Lengths." [17] What is the significance of that group of notes?

A. I don't follow you.

Q. Underneath the grade heading is the length provision.

A. Your question is not clear.

Q. Following the group of notes under the heading "Grades" is another heading called "Lengths."

A. Oh, yes. That is my mistake.

Q. In that heading there is a group of notes dealing with various lengths. What is the significance of that?

A. Well, the significance of that, if certain lengths are left out to make a shipment more valuable the shipper—the seller is permitted to add so much more to his price—the prices which are listed in the above tables.

Q. In other words, if the seller furnishes—by this note it is provided if the seller furnishes a

(Testimony of Roger Jayne.)

more valuable product because of specified lengths, or expense of sorting, and so on, he gets a little more in addition? A. He gets more.

Q. Then following that provision there is a group of notes entitled "Widths." Is that substantially the same character?

A. That is the same character.

Q. Then following that group is a note entitled "Thicknesses," dealing with fractional thicknesses. What is the significance of that paragraph?

A. Well, that particular paragraph there refers entirely to the [18] lumber which is between the two tables, between Table 3 and Table 2. Table 2 only covers 2-inch dimension. There are times when there are other fractional sizes ordered between the 2-inch and 3-inch table, and those provisions there are to provide for that extra service, extra value of the purchase given.

Q. In summary, if somebody wants to buy an item thicker than standard plank, the seller is entitled to get a little more money for it because of the fractional size, and this is the method of computing the price? A. That is the formula.

Q. The next heading is entitled "Working Charges." What is the significance of those notes?

A. These notes there, if it is surfaced a quarter off, which means it is above the American Lumber Standards calling for war lumber, there is a higher price for that item. The second covers industrial lumber, which is also a little heavier surfaced, calls

(Testimony of Roger Jayne.)

for more material and therefore is higher; a premium, a higher price can be charged for it.

The Court: What do you claim, Mr. Bischoff, distinguished these shipments?

Mr. Bischoff: We claim that there is not any method of pricing the item that was shipped from this table, or the notes; that there is just no method of figuring this.

The Court: Why? On account of thickness, width, or what?

Mr. Bischoff: Because of the substandard thickness. [19]

The Court: That is the point, is it?

Mr. Bischoff: That is the point.

The Court: Substandard thickness?

Mr. Bischoff: That is right.

The Court: And what was the thickness of this shipment?

Mr. Bischoff: One and a half inches, surfaced one side.

The Court: What is the listing of the OPA?

Mr. Bischoff: One and five-eighths, surfaced four sides.

The Court: Do you make some claim about the difference in the surfacing, too?

Mr. Bischoff: Oh, yes.

The Court: You claim two distinguishing characteristics take this out of the listing of the OPA?

Mr. Bischoff: That is correct.

The Court: One is surfaced on one side, and its width was scant?

(Testimony of Roger Jayne.)

Mr. Bischoff: Yes.

Mr. Howard T. McCulloch: Thickness, your Honor.

The Court: How?

Mr. Howard T. McCulloch: Thickness.

The Court: Thickness.

Mr. Bischoff: Q. Mr. Jayne, assuming that you wished to surface this piece of lumber which is surfaced one side and is one and a half inches thick and you wish to surface the other side so that you would have a piece surfaced four sides, how [20] much additional thickness would it be necessary to take off the piece?

A. You have already got one side surfaced?

Q. Yes.

A. Normal allowances would be one-eighth. That is what we figure on remanufacture. We figure we have to have an eighth.

Q. Under the rules which you have referred to, how much is the difference between nominal rough thickness and the net thickness of $1\frac{5}{8}$ thickness of dimension lumber?

A. Nominal we figure 2 inches.

Q. So there is a difference of three-eighths?

A. Three-eighths of an inch.

Q. Do you happen to know the source of this material, what it was made from?

A. Well, no, I do not know definitely.

Q. Mr. Jayne, can you tell the Court the significance of the use of American Lumber Standards in

(Testimony of Roger Jayne.)

their application to the building trade and how they are used by architects and engineers?

A. Why, they are made up as a set of what we call American Lumber Standards, which not only influences the rough lumber and the lumber we ship from here but in making up those standards that is all correlated into the framing and sash and doors and all parts of the construction, ordinary home construction, and each district—there are two of them, two different specific classes; one uses a quarter off and all the doorjambs, doors and everything [21] are fit to that standard. Then the bulk of the rail trade is based upon what we call three-eighths of an inch off,—an inch and five-eighths standard and three-eights off. But everything, all construction, is made to conform throughout to the American Lumber Standards.

Q. Well, is it customary for the architect and engineers to figure stresses and strains as well as the supposed requirements on the basis of the American Lumber Standards?

Mr. Howard T. McCulloch: I object to that. I don't think the witness is qualified.

The Court: He may answer subject to the objection.

A. On practically all jobs there is consultation of the architects as to what is the proper strength to put into that particular construction.

Mr. Bischoff: Q. But in arriving at the specifications which should be used in a particular build-

(Testimony of Roger Jayne.)

ing, are those based upon standards fixed by American Lumber Standards?

A. Yes, they are based upon that.

Q. From your thirty years of experience in selling lumber, would you say that dimension lumber surfaced one side to one and a half inches in thickness, of standard widths, is a standard item?

A. No; substandard.

Q. Would you say it is defined as a standard item within the grading rules?

A. No, it is not. [22]

Q. Is it defined as a standard item within the American Lumber Standards? A. It is not.

Q. Is it priced under R.M.P.R. 26 in any fashion whatsoever?

A. There is no way of pricing it under R.M.P.R. 26.

Mr. Bischoff: I think that is all.

Cross Examination

By Mr. Howard T. McCulloch:

Q. Mr. Jayne, the only thing in these invoices which you have before you there that is what you refer to as substandard is thickness; is that not right?

A. That is correct.

Q. That is, the size? The face, in other words, of the lumber, appears to be standard?

A. Standard. So specified, and in all probability was.

Q. Yes. Now then, isn't it true that grade, in other words, quality, as you said—that the grade is

(Testimony of Roger Jayne.)

measured according to the number of defects on the face?

A. And with relation to the size, too. However —pardon me.

Q. Let me ask you to refer to page 95 of Exhibit 2, Standard Grading and Dressing Rules, referring to select merchantable dimension. That is one of the items on all of these invoices. Now I am reading this paragraph 494, referring to select "merch.", I think you call it: "Recommended for use as framing, roof sheathing, joists and rafters. Must be medium grain, except [23] Boxed Heart," and so forth. "Will admit: Knots—sound tight, if not in clusters, approximately: Face with 3 inches, 4 inches, 6 inches, 8 inches, 10 inches, 12 inches over 12 inches." Is there anything in there that says anything about thickness?

A. You invariably use the side, the edge of the piece as well as the face.

Q. Will you point out to me, Mr. Jayne, or to the Court, rather, any reference in there with respect to defects other than as to the width of the face? A. The spike knot.

Q. Well, is there anything else?

A. That is the controlling factor. That is the only thing that occurs really, except the face, is the spike knot.

Q. But there is no differentiation made in these printed rules except as to the width of the face, is there?

(Testimony of Roger Jayne.)

A. That is what they use. Face width is what they use.

Q. That is it.

A. With the exception I have noted, of the spike knot.

Q. But there is no reference in there to the thickness, is there?

A. No, no reference to the thickness.

Q. That is what I want.

A. The reference is to the dimension.

Q. Now you spoke about the building standards and architects. Mr. Bischoff was reading from page 12 of M.P.R. No. 26.

A. Have you got the West Coast edition there, or the Federal [24] copies?

Q. I think this is the West Coast edition.

A. The only difference is the page reference.

Q. Well, you don't need to refer to that. In referring to this matter of thickness it has got a paragraph here, "Thicknesses," and it has allowances, "Fractional thicknesses over 2 inches and under 3 inches price from the table for planks and small timbers by adding \$3.00 per thousand," and so forth. I was correct, wasn't I, when I understood you to say that that was put in there for their own standard items; isn't that right?

A. Their own standard between 2 and 3 inches.

Q. Yes. In other words—

A. There is a spread between—there is a different classification between—you see, the sizes specify

(Testimony of Roger Jayne.)

that was dimension. We all know that means 2-inch lumber.

Q. That is right, but what I was getting at is, it is recognized in the trade, and, if you please, in the construction industry, that there are timbers used and lumber used other than the specific standards that are tabulated in this M.P.R. No. 26?

A. And there is a formula set up for pricing them.

Q. Yes. They are non-standard items, in other words, that are commonly used? A. Yes.

Q. I made a mistake here possibly, Mr. Jayne, when I referred to the grading rules, page 95. That happens to be West Coast [25] Hemlock in dimension and framing, which is the same thing.

A. There is no difference.

Q. On Page 11. A. Yes.

Q. It is the same thing?

A. The same thing.

Mr. Howard T. McCulloch: That is all.

The Witness: Your size there was referred to when you said dimension. That is 2-inch lumber.

The Court: That is all, Mr. Jayne.

Mr. Bischoff: May I ask one question there?

The Court: Yes.

Redirect Examination

By Mr. Bischoff:

Q. Mr. Jayne, following the title, Dimension Lumber, in the rule book, is there a provision which denominates the thickness generally and then has subparagraphs indicating the various grades? Right

(Testimony of Roger Jayne.)

in the rules themselves isn't there a capital heading, dimension lumber, lengths, thickness 2 inches, and so on, and a similar caption for each class of lumber?

A. Yes. It says here for each one it would have. It is part of the heading.

Mr. Bischoff: That is all.

Recross Examination

By Mr. Howard T. McCulloch:

Q. What page were you referring to there? [26]

A. Take—well, the one you want is on 35, paragraph 194.

Mr. McCulloch: All right. Thank you.

The Witness: 193 is where it is. The general caption is in that.

Redirect Examination

By Mr. Bischoff:

Q. Do you happen to know whether the John Schroeder Lumber Company is engaged in the business of buying and selling lumber?

A. No. I have no knowledge of them.

(Witness excused.)

Mr. Bischoff: I think, your Honor, that we will probably not need any other witness. If I have a chance to check by exhibits there are a group of them to be introduced.

The Court: You may check them a little later. Put on your witness now.

Mr. Howard T. McCulloch: At this time, your Honor, the defendant would like to move for a

judgment of dismissal for lack of proof of any violation.

The Court: Decision will be reserved.

Mr. William C. McCulloch: Mr. Patrick, will you take the stand.

The Court: You may swear him again. He was sworn yesterday rather informally. Mr. Patrick will be your only witness?

Mr. McCulloch: So far as I know, your Honor.

[27]

The Court: You won't have any witnesses in rebuttal?

Mr. Bischoff: I don't believe so.

Defendant's Evidence

C. C. PATRICK

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. William C. McCulloch:

Q. Please state your name and where you live.

A. C. C. Patrick: Portland, Oregon.

Q. What connection have you with the Patrick Lumber Company, defendant in this case?

A. I am a member of the corporation.

Q. Are you an officer of it?

A. Yes: president.

(Testimony of C. C. Patrick.)

Q. What is the business of Patrick Lumber Company?

A. The wholesaling of lumber and allied products.

Q. Where is it engaged in business?

A. Portland, Oregon, primarily.

Q. How long has it been engaged in such business here? A. Twenty-nine years.

Q. How many years' experience have you personally had, Mr. Patrick, in the lumber industry in the Pacific Northwest? A. Thirty-eight. [28]

Q. Thirty-eight years? A. Yes.

Q. Has that business been exclusively confined to lumber wholesaling? If not, state in what other capacities you have had experience in the industry?

A. About eight years in manufacturing and simultaneously with the wholesale business also in the retail business.

The Court: How much in fir? All these things apply to fir.

A. In normal years seventy per cent of our dollar volume—seventy per cent of our footage is fir and in wholesaling.

Mr. William C. McCulloch: Q. What is the other thirty per cent, please?

A. Ponderosa pine and sugar pine.

Q. About what volume of business measured in terms of carloads did your company do in the year 1943? A. Over a thousand carloads.

Q. Are you familiar personally, Mr. Patrick,

(Testimony of C. C. Patrick.)

with Exhibit No. 2, entitled "Standard Grading and Dressing Rules for Douglas Fir" and other lumber?

A. Yes.

Q. Are you familiar with the "American Lumber Standards," Exhibit No. 1? A. Yes.

Q. As applying to softwoods?

A. Yes. [29]

Q. Are you familiar, Mr. Patrick, with the term "grade" as it is used in the Douglas Fir lumber industry? A. Yes.

Q. From your experience and knowledge in the industry state what that word "grade" connotes in respect to fir lumber.

A. In Douglas Fir lumber the grade is definitely specified for each individual grade covered by very specific rules in your list 12.

Q. I call your attention, please, to page 36 of Exhibit No. 2, paragraph 195, headed No. 1, "Dimension," and call your attention to the following: "Will admit: Knots—Sound tight, approximately," then specifying "Face width" and "Knot size," and then "Encased knots," specifying them, "Knot holes."

The Witness: Just a minute. Let me see if I have got this same page. That is 36?

Q. Yes. Are the specifications in that paragraph 195 the different elements of grade or quality which you referred to in your last preceding answer? A. Yes, they are, definitely.

Q. Very well. Now is the word "item" used in

(Testimony of C. C. Patrick.)

the lumber industry, lumber item? That is a lumber item, Mr. Patrick?

A. Why, under normal considerations it would be an item in an order. In other words, there might be ten items in one order.

Q. What would be an illustration of two or three items in Douglas Fir? [30]

A. Four pieces of 2 by 4 16 would be called an item. The next item might be ten pieces of 2 by 4 18 that would be on the face of an order.

Q. Very well. Now in the Douglas Fir industry what is understood by the word "product"?

A. What is produced from the log.

Q. What are some of the products manufactured from a Douglas Fir log?

A. Well, when they say "product" universally they refer to what the log produces. In other words, a mill will say, "I get 33 1/3 per cent of "C" clear and better; I get fifteen per cent of No. 1 common and better, and I get fifteen per cent of No. 2 common and poorer," and that gives them offhand just a rough average of the return out of the log.

Q. I call your attention, if you will examine this exhibit 2, to page 142, reading at the top of the page "Sizes" underneath "Construction Grades," then in the left-hand column the word "Product," then beneath the word "Product" the words "Boards, Dimension, Plank & Small Timbers, Stringers, Posts and Timbers, Shiplap," and so on and so on; do you understand that that is the

(Testimony of C. C. Patrick.)

significance or meaning of the word "Product" as used in the Douglas Fir Industry?

A. On this page here those separate designations, "Boards, Dimension," and so forth would be called items.

Q. Very well. Is there any difference—what difference is there, [31] as understood in the industry, between "size" on the one hand and "grade" on the other as applied to Douglas Fir lumber?

A. What is the difference between—

Q. "Size" on the one hand and "grade" on the other.

A. Well, for instance, on a 12 by 12 timber it is entirely different than a 2 by 4 piece of dimension.

Q. Well, let me ask you this question: In the industry do the words "size" and "grade"—are they understood to mean the same thing?

A. No.

Mr. McCulloch: I think that is all on direct.

Cross Examination

By Mr. Bischoff:

Q. Mr. Patrick, if I speak the words to you "No. 1 common," what do you think of?

A. You are referring to lumber, of course, now?

Q. Yes.

A. I would think of No. 1 common lumber.

Q. Do you think of it as an abstract—does No. 1 common mean the same thing to you in 2 by 4's as it does in 12 by 12's?

(Testimony of C. C. Patrick.)

A. Yes, sir. They are No. 1 common, both of them.

Q. Now by that you don't mean that they both have the same number of knots in them, and they both have the same amount of wane, and so on?

A. If you have knots at all it would be impossible to get the [32] same number of knots in a 2 by 4 as in a 12 by 12.

Q. That is it exactly. When you think of No. 1 common in a 2 by 4 you think of the term of grade in relation to the size?

A. Not necessarily, no.

Q. How about boards? Suppose we say merchantable boards, if I just tell you the word "merchantable", what do you think of? Do you think of boards, dimensions, or something else, or do you think of it in relation to dimension lumber?

A. Because in the past years we have sold more boards than any other merchantable grade I do automatically think of boards, but it is no reason anybody else does.

Q. Is it a fact that a board is a different product than dimension lumber?

A. The defects are described differently in a board than in dimension, because a board is used for a different purpose than dimension.

Q. Yet the title "merchantable" and "grade" is the same word—

A. Wait a minute. If you are using a 2 by 4 for a studding, naturally it is for a different pur-

(Testimony of C. C. Patrick.)

pose than using it for shiplap to nail on the outside of it.

Q. You are not answering my question.

A. All right.

Q. I asked you whether the title is the same.

A. What title?

Q. You say merchantable board, or merchantable select, merch. [33] dimension, the title is the same?

A. Yes.

Q. You know that grade standards are computed in a different way, and the specifications are different?

A. Yes, like No. 1 clear flooring is different than No. 1 common dimension.

Q. So that a word descriptive of grade alone is meaningless except in relation to the size of a piece?

A. Oh, no. The first question you asked me was, what did I think of when you say a No. 1 common, and I said I thought of common lumber, No. 1 common lumber, but it would include everything that is No. 1 common, from a 2 by 3 to a 24 by 24 or a 48 by 48, if they cut them that large.

Q. In other words, if you thought of it as a general term, covering a wide variety?

A. Not a variety, no. Covering a specific grade. Naturally a 12 by 12 has different defects than a 2 by 4 does, but the grade basically starts from the same thing.

Q. Is the Schroeder Lumber Company a dealer?

(Testimony of C. C. Patrick.)

A. Yes. What do you mean, wholesale or retailer?

Q. I don't care which one, but they are both; they buy and resell?

A. They are both.

Q. Do you ever file special applications for price approval?

A. I would have said no up to yesterday, but you put in the figure there that we had applied for one on the New York Board of [34] Transportation.

Q. Have you applied for any other?

A. I don't know of any. We may have, though.

Q. That approval—rather, that application was filed in May or June or 1943, wasn't it?

A. That is what your paper I saw yesterday said. I didn't check on it.

Q. Well, you don't have any doubt about it?

A. I will take your word for it that is a correct copy of our letter, and if it was we applied for it. I had never seen it before, however.

Q. Why did you apply?

A. Why did I apply?

Q. Yes.

A. As I remember it, the New York Board of Transportation has a specification that was built primarily on Southern Pine grades which can be translated into Douglas Fir grades, but you have got to go way around the corner to get it, so they were buying on their own specifications which were based on Southern Pine. One of their clauses was

(Testimony of C. C. Patrick.)

square edge and sound. There is no such designation in the Douglas Fir rules. And they asked for a price on those grades and as there were no such grades designated in whatever your book is there, we asked for a special price for same. Now, understand, I don't know as we did. All I know is I saw that letter. But if we wrote that letter, which I think we [35] did, and grant we did, we asked for this special price for those reasons.

Q. In other words, you asked for a special price because you could not fix a price out of the R.M.-P.R. for the grades you shipped?

A. I would guess that was it.

Q. Now before you shipped any of this lumber, or, as a matter of fact, before it was manufactured, you indicated yesterday you had had some conversations, I believe yourself, with Mr. Barker concerning the product and concerning the price?

A. That is what initiated our buying the lumber from him.

Q. At that time you were familiar, were you not, with the fact that this product was scant dimension lumber?

A. What would you call scant, referring to a 2 by 4 surfaced inch and five-eighths? Would you call that scant of two inches?

Q. I am asking you, Mr. Patrick.

A. You are bringing this word "scant" in. Now scant is a word, since you have brought it up, that was used quite a few years ago, in fact about the time these American Lumber Standards were adopt-

(Testimony of C. C. Patrick.)

ed out on the Coast. A number of concerns started buying 3-inch plank sawn $2\frac{3}{4}$ and selling it as 3-inch plank and that became known as scant plank in the rough, and at that time the West Coast industry recognized a scant plank. Now, yes, answering your question directly; if you are referring to an inch and five-eighths, one and a half inch would be scant by an eighth of an inch. But that does not make it scant. If a man sells inch [36] and a half he is not scant of anything. He is selling inch and a half.

Q. We have here a letter which you wrote to Mr. Barker, who is of the West Side Lumber Company, and this letter has been identified in the pre-trial order and it has been stipulated that may be introduced. I don't recall the number now. I would like to have this handed to you. I would like to call your attention to the first sentence, which reads, "Dear George"; that is Mr. George Barker; "Confirming phone conversation of this date, in regard to the scant dimension you offered to our Mr. Patrick", and so on. This letter was written by Mr. Brushoff, of your firm. Now why did you call it scant dimension when you wrote that letter?

A. You just said Mr. Brushoff wrote it, so I don't know why, but I can think very naturally it is inch and a half dimension, so we called it scant. Probably we had been talking about it in the same terms. However, that does not make it scant of what we sold.

(Testimony of C. C. Patrick.)

Q. Do you know what this lumber was manufactured from? A. No.

Q. Did you ever have any conversation with Mr. Barker indicating what it was made from?

A. Yes.

Q. What did Mr. Barker indicate that it was made from?

A. 3-inch plank, resawn. [37]

Q. Did he indicate to you that he was having a lot of trouble with his manufacturing, that he had thick and thin in remanufactured lumber?

A. No more than any mill of that type. All of them do.

Q. Well, did he say anything about it?

A. Yes. He said that his head rig didn't cut accurate enough to allow him to cut 3-inch plank and resaw it and make 2-inch dimension and 1-inch boards surfaced, without a tolerance.

Q. In other words, when you fixed the price between you and Mr. Barker you knew he was resawing this manufactured lumber and that there was going to be a variation, that the product would not come up to standard lumber at all?

A. No. It wasn't remanufactured lumber. What he was trying to do was to get boards primarily, which I think he succeeded in doing, and he ran this stock to what it would make. Now a lot of that dimension would have dressed inch and five-eighths, but with his manpower shortage—now I am saying this from guesswork—I guess his man-

(Testimony of C. C. Patrick.)

power shortage was such he could not afford to segregate that into two lots.

Q. By the same token a lot of it would run inch and a quarter, too, would it not?

A. I would not know. I would say not, because lots they ran on the head rig could not have been in excess of a quarter of an inch one way or the other, and if it wasn't over a quarter of an inch he could easily make inch and a half. [38]

Q. Mr. Patrick, when you fixed the price—when you sold it, when you made out your own invoices, or when you discussed it with Barker, either one, did you file a special application with OPA for a price? A. No.

Q. Did you ever contact anybody in the Portland office of OPA for a price on it?

A. No. No necessity to do it. I was just governed by the price list.

Q. Did you feel at the time you priced the item you could spell out a price for it? A. What?

Q. At the time you made up your own price for this item did you think you could fix a price for it in accordance with the price regulation?

A. I know I did.

Q. All right. Now how did you figure it?

A. Why, we took the nominal 2-inch rough measure.

Q. Now I would like to give you a copy of this regulation and ask you how you arrived at your price, how you figured or spelled out a price, by this book.

(Testimony of C. C. Patrick.)

A. What do you mean by "spell"?

Q. How did you spell it out, how much thickness, length, and so on?

A. That is not spelling, is it? [39]

Q. It is perhaps a bad choice of words, but tell us how you arrived at your prices by using the regulation. I think there is a copy in evidence already.

A. Well, in the first place, it reads there if the buyer—that is Article 12 I think.

The Court: Ask him to identify the article and page he is reading from.

The Witness: Let me have the other copy. I know where they are there.

Mr. Bischoff: I will loan you mine, Mr. Patrick, if you will give it back to me when you get through.

A. This is Revised Maximum Regulation 26 of June 9th, 1943, and this is—

Mr. Bischoff: If the Court please, I loaned my copy to Mr. Patrick. That is a reprint by the West Coast Lumbermen's Association and it has no number on it.

The Court: What exhibit is he reading from?

Mr. Bischoff: I am sorry, I can't tell you. But, your Honor, I think we had better perhaps substitute the copies, because the paging is not the same on the Government's printed copy and on the West Coast copy.

The Court: I want him to read from something I can find when I come to read the record. I want him to state the Exhibit number and page.

(Testimony of C. C. Patrick.)

The Witness: Well, this is Section 12 I am reading right now, [40] and on this West Coast edition numbered 26 on page 5, "If a seller wishes to sell a grade which is not specifically priced in the price tables, he must apply to the Lumber Branch, Office of Price Administration, Washington." As we did not wish to sell any grade that was not a standard grade, and did sell nothing but standard grade, there was no occasion to apply for a special price to Washington.

The next line says, "or wishes to make an addition for special workings", he must apply to the Lumber Branch for a maximum price. We did not wish to make an addition for special workings. Therefore we did not apply for a price. In fact, the price on our material was more than an average of \$2.00 per thousand less delivered to John Schroeder than the price would have been for standard inch and five-eighths dimension.

Further, there was No. 1 common shipped in our order. Paragraph 215 is a little better grade than No. 1 common. Select merchantable is a little better grade than No. 1 common, and the price on the 215 delivered on a Milwaukee rate, where these cars were shipped, was less than the price of No. 1 common delivered on that rate, so the customer got a superior product. And Select Merchantable of this net size of ours would have a considerably greater load-bearing strength than would inch and five-eighths No. 1 common dimension. So all in all the customer got better stock than he paid for. We

(Testimony of C. C. Patrick.)

conformed strictly with the OPA regulation in pricing it, and that is all. [41]

Mr. Bischoff: I would like to move, if the Court please, to strike this entire answer as not responsive. It does not indicate in any way how Patrick Lumber Company priced this item.

The Court: It may stand.

Mr. Bischoff: Q. Now Mr. Patrick, will you please tell me how you applied this price regulation to determine the price on the product you shipped? You told us how you didn't do it; now tell us how you did work out your price.

A. I didn't work it out.

Q. Who did work it out?

A. First, the West Side Lumber Company worked out prices and I told them I didn't know whether they conformed to the ceiling or not. Then Mr. Brushoff in our office—not Bischoff; his name is Brushoff, B-r-u-s-h-o-f-f; he is a Swede—and Mr. Edwards worked it up separately, and their figures agreed and there was a slight variance there between theirs and the West Side's prices, so after numerous exchanges of correspondence and telephone calls the West Side agreed to ours, all except on two items and they showed us we were wrong and we changed them, so that finally they were the result of an agreed meeting of the minds. I guess you would call it.

Q. Did you check those prices with your men?

A. Personally I did not, no. They know much more about the details than I do, so there is no use

(Testimony of C. C. Patrick.)

in my trying to check it, but I would guarantee what they did was right. [42]

Q. And is your answer that you don't know just how they got the prices?

A. No, that is not my answer. I told you I didn't get them, that they got them.

Q. All right. And your answer is, you personally don't know how this lumber was priced?

A. Why, yes. It was priced on this Table 2.

Q. O. K. Now we are getting around to it. Now you tell me how you priced it on Table 2, or how you can price it on Table 2.

A. He had the nominal 2-inch rough there, which was stock. He had to cut to get—

Q. I thought you just got through telling me that you didn't know what he made this from.

A. I told you that he told me that he resawed 3-inch plank, didn't I?

Q. Yes, you told me that.

A. Well then, your question is wrong.

Q. How do you figure that you are going to get full inch of board and full dimension out of a 3-inch plank?

A. Well, if your 3-inch plank is full three inches in the rough, you will resaw—or, rather, he surfaced it, he said; he surfaced it two sides to probably two and three-quarters. He would take out an eighth, as he told me he was just putting in a small resaw and a small resaw, if it is accurate, can resaw with an eighth of an inch kerf. So if he

(Testimony of C. C. Patrick.)

took out an eighth of an inch [43] kerf that would leave him two and five-eighths, wouldn't it?

Q. I haven't quite followed you.

A. He would have one full inch piece. Take that one piece off by itself, which is what he was after, and that dresses twenty-five thirty-seconds. Then he has ostensibly a 2-inch piece left.

Q. Now I would like to have you explain to the Court why this involved process should be used if there was enough lumber there to get standard products. It is a fact, Mr. Patrick, isn't it, that the price of boards was very high at that period of time and that any mill which qualified under the War Production Board circular was entitled to get an additional three and a half dollars for boards and that boards were regarded as profitable under that provision?

A. At that particular time my guess is that they hadn't put in the advance on boards yet and I wouldn't know, but I would say that is entirely beside the point, because the primary object on their part was that the Army and Navy needed boards and the C.P.A. was not giving releases freely for other businesses, rather than WPB—one of those initials anyhow—freely, unless they were shipping what C.P.A. called a required percentage of board. So every mill at that time was endeavoring to increase the output of boards. This mill was primarily what they called a plank mill before then.

Q. On your statement you started figuring the price on a nominal 2-inch thickness. I don't under-

(Testimony of C. C. Patrick.)

stand why you would use nominal [44] 2-inch thickness for a scant product. If you had two-inch thickness you would be able to give a standard product for full price, it seems to me.

A. It wasn't a very involved process, as you mention. All they were doing, the mill was lined up to give 3-inch plank, 4-inch plank, put them out in a car and ship them. When they got to boards they got this resaw. They could not afford to cut boards on the head rig—I don't know that; I didn't see it; but this mill, with a circular head rig could not afford to cut boards with a three-eighths inch kerf on their head rig because they wouldn't have too much lumber left out of it. They cut this plank, which was three inches. They could have sold it for 3-inch plank just as it was, either rough or surfaced. Therefore I presume they figured they were entitled to 3-inch measure for what they cut there. Anyhow, they resawed it, got a 1-inch board and a 2-inch piece, or whatever was left, and he stated that on account of the variance in sawing on his head rig there he would not be safe in running inch and five-eighths dimension but he could make inch and a half, and that is the reason the whole thing developed. I would say that under any reasonable interpretation he was entitled to get the equivalent of 3-inch measure on those planks he cut and broke his back to get 1-inch boards out of them.

Mr. Bischoff: That is all. Thank you, Mr. Patrick.

(Testimony of C. C. Patrick.)

Mr. William C. McCulloch: Mr. Bischoff, will you produce the letter dated March 23, 1944, addressed to OPA, attention of [45] yourself, by Patrick Lumber Company, signed C. C. Patrick, in which he explains in detail how he figured this price.

Mr. Bischoff: I think that is a letter that is in evidence, Mr. McCulloch.

Mr. William C. McCulloch: Is it in evidence?

Mr. Patrick: I think so. In order to make it clear to the Court, there are several documents here which are intended to be in evidence and Mr. McCulloch and I have agreed on, I think, all of them, and we don't want to, because of our going ahead without first identifying the documents, get into the position of having a failure of identification of that sort, and when we finish our case I would like leave for a few minutes to check each of these and supplement anything that has been omitted.

The Witness: There is a letter of March 23 here.

Mr. Howard T. McCulloch: I want to be sure to have that identified and marked so the Court will have it tied up with this cross examination. Just keep the stand, Mr. Patrick.

Redirect Examination

By Mr. William C. McCulloch:

Q. Mr. Patrick, in your testimony did you use the word "nominal" in the sense it is used in the West Coast Grading Rules, Exhibit No. 2, in reference to thickness? A. That is No. 12?

Q. Yes. A. Yes. [46]

Mr. William C. McCulloch: That is all. Thank you.

(Witness excused.)

Mr. William C. McCulloch: May I get this particular exhibit marked now to identify it, so it will be clearly connected—

Mr. Bischoff: I think we had a number on it in the draft of the pre-trial order.

Mr. William C. McCulloch: I want to get it in the record here in connection with your cross-examination of Mr. Patrick. I think the next number, Mr. Person, is 7, isn't it?

The Reporter: I have marked 5 altogether up to this point.

Mr. William C. McCulloch: No. 6 is M.P.R. No. 26. This will be No. 7. I have no further.

Mr. Bischoff: At this time we offer in evidence a typewritten copy of Revised General Order No. 3, relating to delegation of authority to Enforcement Attorneys. This copy has been shown to Mr. McCulloch.

Mr. Howard T. McCulloch: What is the date of this?

Mr. Bischoff: It is dated at the bottom of it. Mr. Howard T. McCulloch: Of course, that is objected to as being wholly immaterial and ineffective to give authority to Mr. Bischoff or any of the OPA superintendents, to act for or in the name of the Administrator. You can't breathe life into something that never existed.

The Court: What is its date? [47]

Mr. Howard T. McCulloch: 6-10-43, I think. Is that correct, at the bottom?

Mr. William C. McCulloch: Yes.

The Court: Is that something I haven't seen?

Mr. Bischoff: No. Your Honor has undoubtedly seen this. This order is not the ratification order of delegation; it is an original order of delegation, delegating power to Regional Attorneys and came out a considerable time before the institution of this suit.

The Court: What kind of a record have you made on the question we are discussing now? What kind of a record has been made in this case?

Mr. Bischoff: On delegation or on the—I am sorry, I didn't understand the question.

Mr. William C. McCulloch: On the matter of delegation of authority to you, I understand the Court to mean, to institute this suit.

The Court: Yes. What is the record in this case?

Mr. William C. McCulloch: Mr. Bischoff yesterday, in the pre-trial conference, stated in open court that he had instituted this action on his own discretion. Is that not correct?

Mr. Bischoff: That is right.

Mr. William C. McCulloch: And not with the knowledge and express direction of the Administrator; is that correct?

Mr. Bischoff: The suit was instituted on my own discretion, pursuant to the general order No. 3. The Administrator, I stipu-[48] lated, did not have personal knowledge of the institution of this suit.

Mr. William C. McCulloch: There was no express direction and knowledge of the Administrator?

Mr. Bischoff: No; correct.

The Court: Is that No. 3 the one you just put in?

Mr. Bischoff: Yes, sir.

Mr. Howard T. McCulloch: Yes. It is revising the first order. I don't think it changes the situation, though.

The Court: Is the first order in evidence?

Mr. Howard T. McCulloch: Not as far as I know.

The Court: This record is this No. 3 and the statement that Mr. Bischoff has made?

Mr. Howard T. McCulloch: That is correct.

Mr. Bischoff: I take it that there is no objection to the form of the proof of the order of delegation—that the submission of the typewritten copy will suffice?

Mr. Howard T. McCulloch: Just as good as the original.

Mr. Bischoff: All right.

Mr. Howard T. McCulloch: For whatever it is worth.

Mr. Bischoff: All right. Then we offer in evidence two documents referred to in the pre-trial order, consisting of the application of the West Side Lumber Company, dated June 8th, and the reply fixing a special price, dated August 1st, 1944.

The Court: Call out the pre-trial numbers that

they have. Name [49] the pre-trial numbers that they have. Do they have pre-trial numbers?

Mr. Bischoff: Yes, your Honor, they do.

The Court: Now, look here, why make such a chore out of this exhibit business?

Mr. Bischoff: Well, we can get them.

The Court: Are there any exhibits that are objected to on either side?

Mr. William C. McCulloch: These two, your Honor, are the only ones that I know of.

The Court: Were those objections stated at the pre-trial hearing?

Mr. William C. McCulloch: Yes, sir.

The Court: All right. Then the thing to do is to consider offered and submitted all of the exhibits that were identified at the pre-trial hearing, subject to the objections that were stated at that time. That is all that needs now to be done about exhibits until that time by Mr. Person, subject to your checking with him, and he will give them new trial numbers the same as the pre-trial numbers.

Mr. Bischoff: If we can get a recess for about three minutes we can get them all in order.

Mr. William C. McCulloch: If your Honor please, there is a special objection to these two exhibits here. Yesterday in the pre-trial conference I asked Mr. Bischoff if these two copies, [50] plus a copy of a letter writeen by Peter Stone to the West Side Lumber Company, first refusing to make a retroactive special price, constituted the only communications between him or his office and Mr. Stone or his office on the subject. He said

no. I asked him then if he would consent to put in the entire communications. He said no. I again, in his office, later yesterday afternoon asked him to permit my inspection of the additional exchange of correspondence in this connection and he refused again.

I will say this: The defendant has no objection to these two copies going in, provided the whole exchange of correspondence, including the letter of June 22, to the West Side Lumber Company from Peter Stone is included and copies of such further communications as Mr. Bischoff and Mr. Stone had on the subject.

There is another objection to the admission of these two documents. That is, the act of Peter Stone in fixing a special price and the act of the West Side Lumber Company in making an application seven or eight months or more after these sales were consummated, in consideration of the highly penal nature of this Act, made Section 205 (e) of the Act as so interpreted and applied here an ex post facto law. I want to make that point in connection with the admission of these documents.

The Court: Now, gentlemen, you straighten everything out between yourselves about the exhibits in the next few minutes while I am doing something else and I will come back. You send [51] me word you are ready. And you will settle about these two letters you are now talking about and related correspondence, and then be prepared to argue the case, too. We might as well go ahead and

finish it up. Clerk, you let me know when they are ready.

(The Court here retired from the Court Room at 10:50 o'clock A. M., and thereupon the following occurred without the presence of the Court:)

Mr. Bischoff: The following exhibits have been introduced in evidence: 1 to 5, inclusive.

No. 6, Copy of Revised Maximum Price Regulation No. 26.

(The document entitled Revised Maximum Price Regulation No. 26, Douglas Fir and Other West Coast Lumber, June 9, 1943, so offered, was marked Plaintiff's Exhibit 6.)

Mr. Bischoff: Exhibit 7, copy of invoice of West Side Lumber Company to Patrick Lumber Company, dated September 3rd, 1943.

(The copy of invoice dated September 3, 1943, West Side Lumber Company to Patrick Lumber Company, so offered, was marked Plaintiff's Exhibit 7.)

PLAINTIFF'S EXHIBIT No. 7

WEST SIDE LUMBER CO.
 Lumber Manufacturers
 Eugene, Oregon

September 3, 1943

Sold to: Patrick Lumber Company
 Terminal Sales Building
 Portland, Oregon
 Ship to: John Schroeder Lumber Company
 Milwaukee, Wisconsin
 Shipping Point: Danebo, Oregon (Direct Mill Shipment)

Invoice No.: 853
Order No.: 597
Your Order No.: 8358
Car: NP17862
F.O.B.: Milwaukee—75½¢

DOUGLAS FIR-S1S TO 1½" H&M S2E Std-GREEN

Sel. Struct.

2x4	2/8 8/10 9/12 6/14 4/16 1/18 1/20	260'	\$50.50	\$13.13
	2/22	29	54.00	1.57
2x6	1/6 1/8 5/10 5/12 2/14 2/16 1/18	202	51.25	10.35
2x8	3/6 9/8 10/10 39/12 16/14 16/16 2/18 1/20	1592'	50.25	80.00
	6/22 3/24	272	52.25	14.21

Sel. Merch.

2x4	5/8 2/10 12/12 12/14 9/16 2/18 2/20	395	48.50	19.16
	6/2	88	52.00	4.58
2x6	8/8 9/10 19/12 6/14 6/16 1/18 3/20	640	49.25	31.52
	2/22	44	51.75	2.28
2x8	4/6 20/8 23/10 125/12 49/14 57/16 13/18 9/20	5235	48.25	252.59
	8/22 5/24	395	50.25	19.85

Par. 215

2x4	5/8 5/10 30/12 13/14 27/16 4/18 8/20	864	47.50	41.04
	4/22 1/24	75	51.00	3.83
2x6	7/8 7/10 26/12 20/14 34/16 8/18 3/20	1466	48.25	70.73
	11/22	242	50.75	12.28
2x8	4/6 20/8 16/10 194/12 90/14 145/16 58/18 37/20	10715	47.25	506.28
	41/22 19/24	1811	49.25	89.19

#2 Common

2x4	5/8 11/10 28/12 25/14 21/16 9/18 8/20	996	43.50	43.33
	11/22 2/24	193	47.00	9.07
2x6	2/8 3/10 37/12 5/14 19/16 2/18 1/20	920	44.25	40.71
	4/22	88	46.75	4.11
2x8	16/8 19/10 221/12 69/14 101/16 44/18 34/20	9365	43.25	405.04
	58/22 36/24	2853	45.25	129.10

38,740' \$1803.95

Est. Frt.—90,749# @ 75½¢ 685.15

1118.80

8% & 2% 110.09

\$1008.71

PLAINTIFF'S EXHIBIT No. 8
WEST SIDE LUMBER CO.
Lumber Manufacturers
Eugene, Oregon

September 16, 1943

Sold to:	Patrick Lumber Company	Invoice No.:	876
	Terminal Sales Building	Order No.:	597
	Portland 5, Oregon	Your Order No.:	8358
Ship to:	John Schroeder Lumber Company	Car:	NP 12494
	Milwaukee, Wisconsin	F.O.B.:	Milwaukee—7½¢
Shipping Point:	Danebo, Oregon (Direct Mill Shipment)		

DOUGLAS FIR S1S H&M TO 1½" S2E TO Std.

Sel. Strnet.					
2x4	2/8 2/10 7/12 2/14 7/16 1/18 6/20	265'	\$50.50	\$13.38	
2x6	1/8 17/12 5/16 1/20	312	51.25	15.99	
"	1/22	22	53.75	1.18	
2x8	1/8 3/10 28/12 8/14 9/16 8/18 2/20	1085	50.25	54.52	
"	2/22 2/24	123	52.25	6.43	
Sel. Merch.					
2x4	5/8 1/10 27/12 7/14 12/16 4/18 9/20	611	48.50	29.63	
"	1/22	15	52.00	.78	
2x6	1/8 1/10 39/12 6/14 17/16 5/18	932	49.25	45.90	
"	2/22	44	51.75	2.28	
2x8	5/8 5/10 68/12 22/14 18/16 20/18 10/20	2749	48.25	132.64	
"	5/22 3/24	243	50.25	12.21	
Par. 215					
2x4	7/8 7/10 70/12 15/14 34/16 10/18 13/20	1440	47.50	68.40	
"	11/22 3/24	209	51.00	10.66	
2x6	4/8 7/10 51/12 16/14 43/16 9/18 7/20	1928	48.25	93.03	
"	5/22 1/24	134	50.75	6.80	
2x8	2/6 12/8 15/10 152/12 74/14 65/16 53/18 26/20	7509	47.25	354.80	
"	15/22 7/24	664	49.25	32.70	
#2 Common					
2x4	8/8 8/10 110/12 30/14 70/16 14/18 15/20	2371	43.50	103.14	
"	12/22	176	47.00	8.27	
2x6	3/8 1/10 76/12 31/14 57/16 22/18 9/20	2868	44.25	126.91	
"	14/22 5/24	428	46.75	20.01	
2x8	5/6 19/8 38/10 287/12 95/14 109/16 57/18 54/20	12248	43.25	529.73	
"	27/22 20/24	1432	45.25	64.80	
		37,808'		\$1734.19	
	Est. Frt.—\$8,340# @ 7½¢.....			666.97	
			1067.22		
	8%.....		85.38		
			981.84		
	2%.....		19.64		
			\$ 962.20		



Mr. Bischoff: Exhibit 8, copy of invoice of West Side Lumber Company to Patrick, dated September 16.

(The copy of invoice dated September 16, 1943, West Side Lumber Co. to Patrick Lumber Company, so offered, was marked Plaintiff's Exhibit 8.)

PLAINTIFF'S EXHIBIT No. 9

WESTSIDE LUMBER CO.
Lumber Manufacturers
Eugene, Oregon

October 7, 1943

Sold to:	Patrick Lumber Company	Invoice No.:	919
	Terminal Sales Bldg.	Order No.:	597
	Portland, Oregon	Your Order No.:	8358
Ship to:	John Schroeder Lumber Co.	Car:	WAB-45712
	Milwaukee, Wisconsin	F.O.B.:	Destination—75½e
Shipping Point:	Danebo, Oregon (Direct Mill Shipment)		

DOUGLAS FIR S1S H&M TO 1½"—S2E to Std.

Sel. Struct. 2x4						
2x4	2/6 8/8 7/10 32/12 8/14 11/16 1/18 7/20	651	\$50.50	\$32.88		
"	3/22	44	54.00	2.38		
2x6	2/6 7/8 3/10 16/12 9/14 11/16 7/18 1/20	738	51.25	37.82		
2x8	1/8 3/10 22/12 6/14 8/16 3/18 1/20	784	50.25	39.40		
Sel. Merch.						
2x4	9/6 31/8 22/10 67/12 18/14 30/16 5/18 9/20.....	1552	48.50	75.27		
2x6	4/6 2/8 6/10 27/12 10/14 16/16 3/18 4/20.....	954	49.25	46.98		
"	1/24	24	51.75	1.24		
2x8	1/6 7/8 4/10 51/12 11/14 15/16 7/18 7/20	1832	48.25	88.39		
Par. 215						
2x4	8/6 35/8 31/10 124/12 56/14 96/16 30/18 32/20.....	3751	47.50	178.17		
"	12/22 4/24	240	51.00	12.24		
2x6	3/6 1/8 7/10 59/12 28/14 45/16 29/18 4/20.....	2518	48.25	121.49		
"	3/22 4/24	162	50.75	8.22		
2x8	7/6 17/8 35/10 95/12 35/14 44/16 24/18 18/20.....	4872	47.25	230.20		
#2 Common						
2x4	7/6 43/8 36/10 135/12 47/14 77/16 29/18 48/20.....	3825	43.50	166.39		
"	7/22 3/24	151	47.00	7.10		
2x6	7/10 82/12 33/14 45/16 15/18 10/20	2706	44.25	119.74		
"	2/22 1/24	68	46.75	3.18		
2x8	8/6 22/8 72/10 270/12 67/14 111/16 60/18 84/20.....	12877	43.25	556.93		
		37,749'		\$1728.02		
	Est. Frt.—87,689# @ 75½e.....			662.05		
			8%	1065.97		
			2%	85.28		
				980.69		
				19.61		
				\$ 961.08		

Mr. Bischoff: Exhibit 9, copy of invoice from West Side Lum- [52] ber Co. to Patrick Lumber Company, dated October 7th, 1943.

(The copy of invoice dated October 7, 1943, West Side Lumber Co. to Patrick Lumber Company, so offered, was marked Plaintiff's Exhibit 9.)

PLAINTIFF'S EXHIBIT No. 9

WESTSIDE LUMBER CO.
Lumber Manufacturers
Eugene, Oregon

October 7, 1943

Sold to:	Patrick Lumber Company	Invoice No.:	919
	Terminal Sales Bldg.	Order No.:	597
	Portland, Oregon	Your Order No.:	8358
Ship to:	John Schroeder Lumber Co.	Car:	WAB-45712
	Milwaukee, Wisconsin	F.O.B.:	Destination—75½¢
Shipping Point:	Danebo, Oregon (Direct Mill Shipment)		

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Sel. Merch.						
2x4	9/6 31/8 22/10 67/12 18/14 30/16 5/18 9/20.....	1552	48.50	75.27		
2x6	4/6 2/8 6/10 27/12 10/14 16/16 3/18 4/20.....	954	49.25	46.98		
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"	12/22 4/24	240	51.00	12.24		
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"	3/22 4/24	162	50.75	8.22		
2x8	7/6 17/8 35/10 95/12 35/14 44/16 24/18 18/20.....	4872	47.25	230.20		
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2x8	8/6 22/8 72/10 270/12 67/14 111/16 60/18 84/20.....	12877	43.25	556.93		
		37,749'		\$1728.02		
	Est. Frt.—87,689# @ 75½¢.....			662.05		
				1065.97		
	8%.....			85.28		
				980.69		
	2%.....			19.61		
				\$ 961.08		



Mr. Bischoff: Next, Exhibit 10, original letter, Patrick Lumber Company to Jerome S. Bischoff, dated March 23, 1944.

(The letter dated March 23, 1944, Patrick Lumber Company by C. C. Patrick, to O.P.A., Attention Mr. Jerome S. Bischoff, so offered, was marked Plaintiff's Exhibit 10.)

PLAINTIFF'S EXHIBIT No. 10

Cable Address: "Patco"

PATRICK LUMBER CO.

WHOLESALE

Portland, Oregon

March 23, 1944

[Stamped]: Received Mar, 24, 1944, Portland,
OPA.

O.P.A.,
Bedell Building,
Portland, Oregon

Gentlemen:
Attention Mr. Jerome S. Bischoff

Referring to our orders 8247 and 8358 and as per our conversation, the original of these orders (8247) resulted from a conversation in Eugene between Mr. Barker and Mr. Patrick.

Mr. Barker advised he was able to salvage considerable lumber with a resaw he had just installed and that he was able to do this and produce more Board than previously, and the way he secured the stock developed stock on which he would give us the exclusive sale if we in turn would agree not

to advise other mills how he was doing it, or buy similar stock from other mills.

He then figured out "ceiling" prices for 2" Dimension Surfaced 1½ and said: "There you are. What do you think?" I said: "If your figures are right that is a good thing if the yards will buy it. I then requested that he hold it open for us for four days to give Mr. Brushoff an opportunity to check prices and feel out our selling connections to see how it would sell.

He said it would all dress up clean, but he would have to have the privilege of hit-or-miss. I said that would kill the sale. After considerable conversation hit-and-miss was agreed upon. However, our initial order was written up without the hit-and-miss privilege and think several cars shipped that way. However, as soon as this omission was called to our attention the order and subsequent shipping directions were corrected to hit-and-miss.

Mr. Brushoff checked the "ceiling" prices and the agreed prices were adjusted to conform, and which we considered conformed exactly with the then effective "ceiling."

We believe Mr. Barker worked this out in perfectly good faith. In fact, I considered it resourceful of him to figure a way to produce more Boards and at the same time actually increase the total production of his mill as well as salvage some stock that otherwise would not have been salable as lumber.

As I recall his arguments they were to the effect: "I am cutting lots of 3" Plank. My rigs are not

well enough lined up to get as accurate sawing as I want. I get from $\frac{1}{8}$ to $\frac{1}{4}$ " variation in thickness of Plank." I said: "All right, you can get one Board S4S 25/32 and one piece of Dimension $1\frac{5}{8}$ hit-and-miss sure, and probably all clean up S1S2E $1\frac{5}{8}$ ".

I then set down the following as what he would get out of his 3" Plank:

1 resaw cut $1/8$ ", or.....	4/32
1 board	25/32
Surfacing 2 sides	7/32
1 piece Dimension $1\frac{1}{2}$, or....	1-16/32
Surfacing 1 side $1/8$, or.....	4/32
<hr/>	
	1-56/32, or 2-24/32, or 2-3/4.

"There you are— $1\frac{1}{2}$ net Dimension with $\frac{1}{8}$ to spare on stock that has $\frac{1}{8}$ variation, so you can make $1\frac{5}{8}$ hit-and-miss."

He said: "Whose lumber is this and whose mill is this you are running? I told you I wanted this business to take care of my stock that runs $\frac{1}{8}$ to $\frac{1}{4}$ " variation. I am giving you first chance at it. If you don't want it II can sell elsewhere easily and, further, while we shoot at $\frac{1}{8}$ kerf on the resaw we can't depend on that and $1\frac{1}{2}$ net is the only thing I can count on safely. So take it or leave it."

So while we checked up he held it open for us.

We are sending copy of this letter to West Side Lumber Company so that they may advise you if any of the statements made from memory do not agree with their recollection.

We are enclosing copy of our letter of April 27, 1943 to West Side Lumber Company, written after we had checked "ceiling" prices and salability of the stock.

Yours very truly,

PATRICK LUMBER COMPANY,

By C. C. PATRICK,
President

CCP:LD

CC: West Side Lumber Co.,
Eugene, Oregon

Mr. Bischoff: Next is Exhibit No. 11, a copy of letter, Patrick Lumber Company to George R. Barker, dated April 27th, 1943.

Mr. William C. McCulloch: '44.

(Mr. Bischoff shows letter to Mr. McCulloch.)

Mr. William C. McCulloch: No. That is wrong, obviously.

Mr. Bischoff: This was sold in '43. That is right.

Mr. William C. McCulloch: Yes, that is correct.

(The letter dated April 27, 1943, Patrick Lumber Company by W. A. Brushoff, to Geo. R. Barker, so offered, was marked Plaintiff's Exhibit 11.)

PLAINTIFF'S EXHIBIT No. 11

Cable Address: "Patco"

PATRICK LUMBER CO.
WHOLESALE

Portland, Oregon

April 27, 1943

Mr. Geo. R. Barker,
West Side Lumber Co.,
Eugene, Oregon

Dear George:

Confirming phone conversation of this date, in regard to the scant Dimension you offered to our Mr. Patrick.

We have an order coming up for this, based upon FOB mill prices, but are trying to get this amended to "delivered" in accordance with your suggestion.

We also understand that you wish the grade now to read

Approximately 10% #2 Common
Balance Para. 215, plus 301 and
Select Merch. plus 301

Also, we understand that you can arrange to ship one carload next week and follow at the rate of one car every six or seven days, shipping a total of 10 cars.

If our understanding is not correct will you please phone us upon receipt of this letter.

Yours very truly,

PATRICK LUMBER COMPANY,

By W. A. BRUSHOFF

Mr. Bischoff: All right. Now exhibit No. 12, copy of Revised General Order No. 3 of the Administrator of the Office of Price Administration.

(The copy of Revised General Order 3-- Representation of Administrator in Court Proceedings, Service of Pro- [53] cess, so offered, was marked Plaintiff's Exhibit 12.)

Mr. Bischoff: Now for identification.

PLAINTIFF'S EXHIBIT NO. 12
REVISED GENERAL ORDER 3*
REPRESENTATION OF ADMINISTRATOR
IN COURT PROCEEDINGS

Service of Process

General Order No. 3 is revised and amended to read as follows:

Pursuant to the authority conferred upon the Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Orders

* 7 FR 2238, 4852, 7910. Formerly entitled "Administrative Order 1." Revised Order issued 6-10-43, 8 FR—.

9125, 9250, 9280 and 9328, the following order is prescribed:

(a) Institution of and intervention in civil proceedings. The General Counsel or the Acting General Counsel, the Director of the Enforcement Division or the Acting Director, the Regional Attorneys or the Acting Regional Attorneys, and the Regional Enforcement Attorneys or the Acting Regional Enforcement Attorneys, are each authorized to institute and intervene in appropriate civil actions or proceedings, in the name of the Price Administrator; and any of them may authorize any other attorney employed by the Office of Price Administration to institute or intervene in appropriate civil actions or proceedings in the name of the Price Administrator. Except as herein provided, no other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, has authority to institute or intervene in proceedings on behalf of the Price Administrator.

(b) Service of process upon the Administrator. Service of process upon the Price Administrator may be made by serving him personally, or by leaving a copy thereof at the Office of the Secretary, Office of Price Administration, Washington, D. C. In actions commenced outside the District of Columbia to obtain judicial review of rationing suspension orders issued under Procedural Regulation No. 4, service of process upon the Price Administrator may be made by personal service thereof upon the District Director or, in the latter's

absence, upon the Acting District Director of the Office of Price Administration for the OPA district in which the administrative proceedings resulting in the suspension order were originally instituted. No other officer or employee of the Office of Price Administration, whether employed in the principal Office in Washington, D. C., or in any regional or field office, is authorized to accept service of process on behalf of the Price Administrator or enter his appearance in any action or proceeding, except as herein provided.

(c) Appearance for the Administrator in defensive suits. The General Counsel or the Acting General Counsel, the Director of the Enforcement Division or the Acting Director, and the Assistant General Counsel or the Acting Assistant General Counsel in charge of the Court Review, Research and Opinion Division are each authorized to appear for and represent the Price Administrator or the Office of Price Administration in any action or proceeding instituted against the Price Administrator or the Office of Price Administration in the Emergency Court of Appeals and in proceedings for the review of determinations of the Emergency Court of Appeals in the Supreme Court; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any such action or proceedings. The General Counsel or the Acting General Counsel, and the Director of the Enforcement Division or the Acting Director are each authorized

to appear for and represent the Price Administrator or the Office of Price Administration in any other action or proceeding instituted against the Price Administrator, or the Office of Price Administration; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any other such action or proceeding.

GEORGE J. BURKE,
Acting Administrator

Mr. William C. McCulloch: Mark these for identification.

Mr. Bischoff: Now for identification, Exhibit No. 13, letter dated June 8th, 1944, West Side Lumber Company to Office of Price Administration.

(The copy of letter dated June 8, 1944, West Side Lumber Company by G. R. Barker, Vice-President, to Office of Price Administration, Lumber Division, Washington, D. C., so offered, was marked Plaintiff's Exhibit 13 for identification.)

PLAINTIFF'S EXHIBIT NO. 13

Phone 2369
Phone 2836J2

WEST SIDE LUMBER CO.

Lumber Manufacturers
Eugene, Oregon

June 8, 1944

Office of Price Administration,
Lumber Division,
Washington, D. C.

Gentlemen:

In accordance with request of Mr. Jerome S. Bischoff, of Portland, Oregon, O.P.A. office, we wish to submit the following request for special price authorization for 2" Dimension S1S2E 1½" hit-and-miss.

In 1943 we entered order delivered destination, based on following FOB values, freight to be added on weights shown per M feet:

"Ceiling" prices as per O.P.A. regulation #26 effective 1943, for 2"
Dimension S1S2E 1½xStandard width

	#2 Com	Para. 215	Para. 215 and 301	Select Merch.	Select Merch. and 301	Weight
2x4 -6/20'	26.50	30.50	32.50	31.50	33.50	2250#
2x6 - "	26.50	30.50	32.50	31.50	33.50	2350#
2x8 - "	25.50	29.50	31.50	30.50	32.50	2350#
2x10- "	25.50	29.50	31.50	30.50	32.50	2400#
2x12- "	25.50	29.50	31.50	30.50	32.50	2400#

Lengths over 20 ft. at list difference.

Weights shown are as per OPA authorization for the dressing shown.

We trust it may be possible for you to favor us with an early decision as to the correctness of the price basis shown.

Yours very truly,

WEST SIDE LUMBER

COMPANY,

By /s/

G. R. BARKER

Vice-President

CC: Jerome S. Bischoff,
OPA Office
Portland, Ore.

Mr. Bischoff: I now offer No. 14 for identification, letter, Peter A. Stone, Price Executive, Lumber Branch, OPA, to West Side Lumber Co., dated June 22nd, 1944.

(The copy of letter dated June 22, 1944, Peter A. Stone, Price Executive, Lumber Branch, to West Side Lumber Co., so offered, was marked Plaintiff's Exhibit 14 for identification.)

PLAINTIFF'S EXHIBIT NO. 14

Jun 22 1944

West Side Lumber Co.
Eugene Oregon

Gentlemen:

This acknowledges your letter of June 8 in which you list 2" sizes and grades sold during 1943 and SES2E to 1½" x Standard widths.

As is the case as present, during 1943 when MPR26 was effective, sellers of sizes, grades or services of any description not priced in this regulation were required to make application to this Office for and obtain an approved price before such sales were consummated.

In the case of the sales you refer to, no such application was made to this Office and no price can be approved at this time.

Very truly yours,

PETER A. STONE

Price Executive
Lumber Branch

CC: Jerome S. Bischoff

Chief, Lumber Enforcement Unit
Bedell Building
Portland (4)

Mr. Bischoff: Next, No. 15 for identification, letter dated August 3, 1944, Peter A. Stone to West Side Lumber Company.

(The copy of letter dated August 3, 1944, Peter A. Stone, Price Executive, Lumber Branch, OPA, to West Side Lumber Company, so offered, was marked Plaintiff's Exhibit 15 for identification.)

PLAINTIFF'S EXHIBIT NO. 15

(Copy)

Aug 3 1944

West Side Lumber Company

Eugene

Oregon

In reply refer to 6073:30:AIM RMPR 26

Gentlemen:

This refers to your letter of June 8, 1944, requesting us to establish a price for common grades of Douglas Fir dressed hit and miss green to 1½' and shipped and invoiced by you as 2" lumber during a period from June to October 1943, inclusive.

Under date of June 22, 1944, we replied to your letter pointing out that inasmuch as request for price approval had not been made prior to shipment that we felt that we could not establish prices at this time.

We are now advised by Acting Chief Counsel that in view of your request for the establishment of prices that we are required to comply.

Under Section 12. RMPR 26, we herewith approve as effective during the period from June to October, 1943, inclusive. the following prices, f.o.b. car mill, and weights on which freight charges should be estimated in arriving at delivered prices.

Size Invoiced		*Approved Invoice Size	Approved #2	Approved Prices #1 & Btr.
2x4 6/20' S1S2E, Hit and Miss to 1½x3½'	1½x4		\$26.50	\$28.50
2x6 " " "	1½x5½	1½x6	26.50	28.50
2x8 " " "	1½x7½	1½x8	25.50	27.50
2x10 " " "	1½x9½	1½x10	25.50	27.50
2x12 " " "	1½x11½	1½x12	25.50	27.50

Permissible Estimated Weights:

1½x4 S1S2E, Hit & Miss to 1½x3½"	-----	2800 lbs.
1½x6 " " "	1½x5½	2850 lbs.
1½x8 " " "	1½x7½	2900 lbs.
1½x10 " " "	1½x9½	2900 lbs.
1½x12 " " "	1½x11½	2950 lbs.

* Example of computation of approved size to be used in invoicing:

1 piece 1½x8-12' = 13' rather than 16' as 2x8

The prices herewith approved are based upon the following facts:

a. Surfacing 2" green lumber to 1½" would constitute an unwarranted waste never condoned by industry practice and which cannot be approved by this office.

b. 1/8" is sufficient tolerance between dressed size and nominal rough size when "hit and miss" dressing is permissible and both the dressed and rough size is green.

c. Grade paragraphs 215, Select Merchantable, and 301 are designed for stress and durability, and in a case such as this where substandard sizes are sold, such sizes offset any practical grade improvement that would otherwise be accomplished by these paragraphs. Hence, we cannot find justification for approving any price higher than No. 1.

d. Weight approval is under "Shipping Weight Formula for Sizes Not Listed" of which the following is an example:

$1\frac{1}{2} \times 3\frac{5}{8}$ is 83.6% of $1\frac{5}{8} \times 4$: green weight of $1\frac{5}{8} \times 4$ is 2300 lbs., hence the weight of $1\frac{1}{2} \times 3\frac{5}{8}$ is 83.6% of 3300 lbs., or 2800 lbs. (adding next higher even 50 lbs. to actual computation.)

Sincerely yours,

PETER A. STONE

Price Executive

Lumber Branch, OPA

AIMICHELL/ek

7-23-44

Mr. Bischoff: I think that is all. [54]

Mr. William C. McCulloch: That is all.

(At 12:09 o'clock P. M., the Court returned to the bench and the following further occurred:)

The Court: What are these letters you want, Mr. McCulloch, letters between Mr. Stone and Mr. Bischoff?

Mr. William C. McCulloch: Any communications that, your Honor, had reference to—

The Court: No, no. Between whom?

Mr. William C. McCulloch: Mr. Stone or his office and Mr. Bischoff or his office, on this particular subject of a special retroactive price.

The Court: I deny the request and allow an exception.

(At this point the Court excused the Court Reporter and the argument was not reported.)

[55]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported all of the evidence given and oral proceedings had except the arguments at the conclusion of the evidence upon the trial of the above entitled cause before the Honorable Claude McColloch, Judge of the above entitled Court, on Tuesday, December 5, 1944; that I thereafter caused my shorthand notes to be reduced to typewriting, and the foregoing and hereto attached 55 pages of typewritten matter, numbered 1 to 55, both inclusive, constitute a full, true and accurate record of all of the oral proceedings had and evidence given upon said trial, except the arguments following the conclusion of the evidence.

Dated at Portland, Oregon, this 9th day of December, A. D. 1944.

(Sgd) ALVA W. PERSON

Court Reporter. [56]

[Endorsed]: Filed Dec. 9, 1944.

[Endorsed]: No. 11023. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. Patrick Lumber Company, a corporation, Appellee. Transcript of Record. Upon appeal from the District Court of the United States for the District of Oregon. Filed April 3, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11023

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

v.

PATRICK LUMBER COMPANY, a corporation,
Appellee.

DESIGNATION OF PORTION OF
RECORD TO BE PRINTED

Comes now the appellant and designates for printing the entire record heretofore designated as the record on appeal in the Court below, except Item No. 6, "Order Denying Motion for Supplementary Findings of Fact and Conclusion of Law",

and Item No. 12, "Transcript Proceeding March 19, 1945", as described in said designation of record in the Court below.

Dated: April 14, 1945.

DAVID LONDON,

Acting Regional Litigation

Attorney

FRANZ E. WAGNER

District Enforcement Attor-

ney

[Title of Circuit Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

Comes now the appellant and designates the following statement of points to be relied upon on this appeal:

1. The District Court erred in finding that the prices charged by defendant for the three cars of lumber described in the complaint did not exceed the maximum prices applicable thereto under the provisions of Revised Maximum Price Regulation No. 26.

2. The District Court erred in concluding that the defendant did not violate the Emergency Price Control Act of 1942 or any regulation, order or price schedule issued thereunder.

3. The District Court erred in concluding that the complaint should be dismissed.

Dated: April 14, 1945.

DAVID LONDON

Acting Regional Litigation
Attorney

FRANZ E. WAGNER

District Enforcement Attorney

[Endorsed]: Filed Apr. 10, 1945. Paul P.
O'Brien, Clerk.

